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Supreme Court, U.S.
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No.

In The Supreme Court of the United States

OCTOBER TERM, 1995

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,
Petitioner,

v.

J. JACK BRAS, INDIVIDUALLY AND DBA BUSINESS AS J. JACK BRAS & ASSOCIATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 13, 1995

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QUESTIONS PRESENTED

1. Whether respondent has standing to challenge a California statute and implementing regulations of the Public Utilities Commission of the State of California ("Commission") that establishes voluntary goals, not quotas, set-asides or preferences, for the procurement of goods and services by public utilities from women and minority business enterprises in public utility procurement programs:

   a.) Whether respondent has satisfied the injury-in-fact requirement where respondent failed to demonstrate that the statute and implementing regulations impose a barrier to his placing a bid for an architectural public utility contract; and

   b.) Whether respondent has demonstrated a causal nexus between his alleged injury that is fairly traceable to the Commission where the alleged injury results from the independent acts of a third party public utility not before the court.

LIST OF PARTIES

The petitioner is the Public Utilities Commission of the State of California ("Commission"), Philip Bremond in his representative capacity as Women, Minority, Disabled Veteran Business Enterprise Program Manager* and Neal Shulman, in his representative capacity as former Executive Director. The respondent is J. Jack Bras, individually and doing business as J. Jack Bras & Associates.

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* Hereinafter, the use of the word "Petitioner" includes the Commission, Philip Bremond and Neal Shulman.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, the Public Utilities Commission of the State of California ("CPUC" or "Commission"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 23, 1995.

OPINIONS BELOW

The March 17, 1993 order of the District Court granting Petitioner's motion for summary judgment is unreported. *Bras v. California Public Utilities Commission,* No. CV-92-0304-WHO (N.D. Cal. March 17, 1993). App. 25-42.[1] The July 5, 1995 opinion of the Ninth Circuit Court of Appeals is reported as *Bras v. California Public Utilities Commission*, 59 F.3d 869 (9th Cir. 1995). App. 1-24.

[1] Where indicated, "App." refers to the Appendix of this petition.

JURISDICTION

On July 5, 1995, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") rendered the judgment which petitioner seeks to have reviewed. On August 15, 1995, the Ninth Circuit denied the Commission's petition for rehearing and suggestion of appropriateness of rehearing *en banc.* App. 43. The judgment of the Ninth Circuit was entered on August 23, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

California Public Utilities Code sections § 8281-8386 and the Commission's General Order 156 are fully set forth in the Appendix. App. 62-91.

STATEMENT OF THE CASE

1. Statement of Facts

In 1986, the California State Legislature passed the "Women and Minority Business Enterprises" ("WMBE") Law, effective January 1, 1987, which is codified at sections 8281-8286 of the California Public Utilities Code ("Code").[2] In 1990, the Legislature added disabled veteran business enterprises to the Code. The Commission's program is now referred to as the Women, Minority and

[2] Prior to any legislative action, the Commission has overseen programs to increase the participation of minority-owned and women-owned businesses in public utility contracting. Pursuant to a 1977 Commission investigation, the Commission first established reporting requirements in 1982, for WMBE procurement by the major utilities and also ordered that each utility's WMBE program be reviewed in general rate case proceedings. D.82-12-101, 10 Cal.P.U.C.2d 414 (1982). The Commission subsequently required utilities to submit tracking procedures for WMBE activities, including the reporting of procurement results by ethnicity, gender and procurement categories.

Disabled Veterans Business Enterprises ("WMDVBE") Program. The Code requires the Commission to establish guidelines for all gas, electric, and telephone utilities with gross annual revenues exceeding $25 million and their Commission-regulated subsidiaries and affiliates, to be utilized in establishing programs pursuant to the Code, including a procedure for the utilities to submit annual detailed and verifiable plans for increasing utility procurement of goods and services from WMDVBEs in all categories. Code § 8283(a) & (c), App. 65. The Code requires that these annual plans shall include short- and long-term goals and timetables, but not quotas, and that these plans include methods for encouraging both prime contractors and grantees to engage WMDVBEs in subcontracts in all categories which provide subcontracting opportunities. Code § 8283(b), App. 65.

The Commission's General Order 156 ("Order"), which implements the Code, requires utilities to set substantial and verifiable short-term (one year), mid-term (three years) and long-term (five years) goals for the utilization of WMBEs. Order § 8, App. 85. Section 1.3.13 of the Order defines "goal" as a "target which when achieved, indicates progress in a preferred direction. A goal is neither a requirement nor a quota." Order § 1.1.13, App. 75. The Order establishes goals of not less than 15 per cent for Minority Business Enterprises ("MBEs") and 5 per cent for Women Business Enterprises ("WBEs"). Order § 8.2, App. 85. The Commission's WMDVBE Program is not a set-aside program. Moreover, the Commission does not prescribe any particular method or means by which utilities must pursue these goals. Each utility is free to design its own WMDVBE program according to the particular requirements and needs of the individual utility and to use its judgment with respect to the most appropriate means to be employed. Furthermore, the utilities retain their authority to use their legitimate business judgment to select the best person for the

work at hand and members of all racial, ethnic, and national origin classifications are allowed to compete. In addition, where application of any of these rules results in undue hardship or unreasonable expense to a utility, section 1.1.3 of the Order allows a utility to request relief by filing an application or an advice letter with the Commission. Order § 1.1.3, App. 74.

From 1969 to 1991, respondent Bras, a white male architect, provided architectural services to Pacific Bell, a telephone public utility regulated by the Commission. Approximately 30 per cent of Bras' gross receipts after 1983 came from architectural services provided to Pacific Bell. In February, 1991, Bras received a letter from Pacific Bell requesting preliminary business information from firms that had recently provided architectural services to Pacific Bell's Real Estate Management organization in the San Francisco Bay Area. Pacific Bell indicated in that letter that in an effort to improve the overall quality of real estate services within Pacific Bell, it intended to develop improved business partnerships with the firms with which it continued to do business. Toward that end, Pacific Bell indicated that it believed that those improvements were more likely to be accomplished with a limited number of affiliations. E.R. 114, App. 92.[3] With its letter, Pacific Bell included a "Pre-Qualification Criteria" form which Pacific Bell used to assist it in selecting a group of architectural firms to submit proposals. Question 10 on the form asked: "[A]re you currently certified through the Cordoba Corporation Clearing House process for Minority/Women Business Enterprise status?" Bras completed the form and answered question 10 in the negative and returned the form to Pacific Bell on February 4, 1991. E.R. 115-117, App. 94-96.

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[3] Where indicated, "E.R." refers to the **Excerpts of Record** filed with the Ninth Circuit, below.

In response to Pacific Bell's solicitation, thirteen firms completed the forms. Pacific Bell performed a selected weighting of the thirteen firms on the basis of quality of past performance, central office design experience, administrative space design experience, WMBE status, number of licensed architects, number of years in business, 1990 expenditures, CAD capability, and size of organization. E.R. 124-125, App. 97-99. Under Pacific Bell's weighting criteria of a total of 95 points, points were given in each of these categories with the majority of the weighting criteria based on past performance (25 points), administrative design experience (10 points), and central office design experience (25 points). E.R. 130, App. 46. A WMBE received 10 points. *Id.* A non-WMBE received zero points in that category.

In June 1991, Bras was informed by Pacific Bell that it had made a business decision to work closely with a small number of suppliers in the San Francisco Bay Area and to develop working relationships with those firms over a period of time. Mr. Jack Behuresht, Pacific Bell's Director of Project Management Real Estate, informed Bras that:

> [s]ince a close relationship is very difficult to maintain when working with a large number of architectural firms, we unfortunately, have had to sacrifice some past associations with very competent and professional firms such as yours. The process that we used to select architectural firms in the Bay Area included evaluation of current information that you submitted in your letter of February 4th. We also surveyed the past experiences of our project managers and field engineers with each firm. I would like to assure you that your firm was very competitive and was not eliminated due to any unsatisfactory performance . . . We plan to maintain your information on file and will be happy to consider Bras & Associates when our

> contract for architectural services is reevaluated in the future.

E.R. 119, App. 100.

Through subsequent communication and meetings with Pacific Bell, Bras was informed that he ranked sixth among the thirteen firms. The firm that finished third in the ranking was an MBE. In his deposition, Mr. Behuresht stated that the top three in the ranking did not automatically get a contract with Pacific Bell. While acknowledging that "mathematically" Bras would have ranked third if the WMBE factor had been eliminated, Mr. Behuresht emphasized that the selection was not done strictly on a mathematical basis. E.R. 70-72, App. 103-105. Pacific Bell's decision was to engage the top three firms for further review and negotiation, because potentially, Pacific Bell may not have reached an agreement with any of these firms to go further. It was a preliminary screening, just a guide for Pacific Bell to go through successive steps. E.R. 72, App. 104-105. Indeed, Mr. Behuresht stated that it was not true that Bras would have been one of the top three firms had the WMBE status been eliminated as a factor. He stated:

> [t]he way we look at it is we put emphasis on expense of central office work and also administrative work and one of the objectives would have been for us to ensure that we had more than one firm that could deliver these types of services. On this particular scenario that you described, had Mr. Bras been the third firm, we would have been in a very awkward position of not having an architectural — not having more than one architectural firm that was proficient on the administrative design experience.

E.R. 72-73, App. 105. Mr. Behuresht again stressed that Pacific Bell did not pick the top three exclusively based on mathematics. Pacific Bell looked at the top three to ensure

that the top three would provide the balanced capabilities Pacific Bell needed. That allowed Pacific Bell to go to the next step of beginning the dialogue on association with those firms, of negotiating and of receiving additional data. E.R. 75-76, App. 108-109. In addition, contract changes were involved. If one of the firms did not prevail, then Pacific Bell would have gone back to the list and taken the next firm in a balanced way that would complement the firms that they had, not necessarily the firm with the next highest mathematically weighted score. E.R. 77, App. 109-110. None of the decisions made by Pacific Bell concerning its procurement of architectural services or the method of evaluating qualifications were required by the Code or Order, nor reviewed or approved by the Commission.

2. Proceedings Below

On January 10, 1992, Bras filed a complaint against Pacific Bell alleging Pacific Bell's WMBE program violated Bras' statutory and constitutional rights in view of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Bras also named the Commission and two individuals as defendants,[4] alleging the Code and the Commission's Order also violated his constitutional rights. Bras sought damages from Pacific Bell. In the course of the proceedings before the District Court, Bras executed a settlement under seal with Pacific Bell, pursuant to which Pacific Bell was dismissed with prejudice from the proceeding. Bras represented to the District Court that 50 percent of the monetary consideration he received under the settlement compensated him for economic damages (*i.e.*, his lost business with Pacific Bell), while the remaining 50 percent compensated him for non-economic damages. *Bras v. California Public Utilities Com-*

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[4] The individuals, both of whom are named in their representative capacities, are Philip Bremond, WMDVBE Program Manager for the Commission, and Neal Shulman, former Executive Director of the Commission. Mr. Shulman is no longer employed by the Commission.

mission, No. CV-92-0304-WHO, slip op. at 9 (N.D. Cal. March 17, 1993), App. 33. However, Bras continued his action against the Commission seeking declaratory and injunctive relief. Upon cross motions for summary judgment, the District Court granted the motion of the Commission and denied Bras' motion on the ground that Bras had failed to satisfy the injury component for Article III standing.

In its decision, the District Court noted Bras alleged he lost business as a result of the Code and the Order, *i.e.*, his account with Pacific Bell, which formed the basis of his claim for damages against Pacific Bell. However, the District Court pointed out that Bras did not allege he might lose any "future" business because of either the Code or the Order. The District Court further stated Bras "did not allege, and there is nothing in the record to indicate that plaintiff ever has done (or ever intends to bid for) any work for a utility, other than Pacific Bell, that is subject to" the Code and Order, and that Bras' settlement with Pacific Bell extinguished all of his claims with respect to Pacific Bell." *Id.* at 16-17, App. 39. The District Court concluded that:

> For its part, Pacific Bell already has entered into "improved business relationships" with architectural firms in the Bay Area and plaintiff is not one of those firms. Plaintiff has neither alleged nor presented the Court with a shred of evidence that Pacific Bell would not have attempted to narrow the number of architectural firms it used in the absence of the WMBE and the General Order; nor has plaintiff presented any evidence that Pacific Bell would reevaluate its decision not to retain plaintiff for further business were the WMBE nullified. Plaintiff's only legal complaint with the process Pacific Bell used to determine which firms it would continue to employ was that it should not have considered WMBE status as part of the

> equation. Plaintiff's settlement with Pacific Bell effectively extinguished that objection, and with it plaintiff's charge that the WMBE and the General Order interfered with his business opportunities in a constitutionally intolerable manner.

Id. at 17-18, App. 40-41. The District Court also rejected Bras' claim that he had standing to seek declaratory and injunctive relief on behalf of himself and all other "similarly situated" white males. *Id.* at 18, App. 41. Having found that Bras lacked standing, the District Court did not address the merits of Bras' constitutional claims. Bras appealed.

On July 5, 1995, in a split decision, the Ninth Circuit reversed and remanded, concluding that Bras had satisfied his burden of showing injury-in-fact and that Bras has standing to seek declaratory and injunctive relief against the Commission. *Bras v. California Public Utilities Commission.* 59 F.3d 869 (9th Cir. 1995). The Ninth Circuit found a sufficient causal nexus between Bras' injury and the Commission's actions in enforcing the Code and implementing the Order because "the Code and Order effectively encourage, if not compel, Pacific Bell to adopt discriminatory programs." *Id.* at 875, App. 16. In addition, the Ninth Circuit found Bras met the "future injury" prong of the injury-in-fact requirement for injunctive relief, determining that Bras will suffer future injury if the Commission's program is not enjoined. *Id.* at 874, App.13. Judge Pregerson delivered a vigorous dissent and challenged the majority's conclusions. Judge Pregerson concluded that Bras had failed to establish a causal nexus between the state's provisions and any future injury that Bras may incur from a utility's specific program. *Id.* at 879, App. 23. He further concluded that "Bras offers us a hypothetical injury, abstract in nature. We should not exceed our judicial authority by holding that he has standing." *Id.* App. 24.

On July 19, 1995, petitioner filed a petition for rehearing and suggestion of appropriateness of rehearing *en banc*. On August 15, 1995, the Ninth Circuit denied that petition. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

I.

THE NINTH CIRCUIT HAS DECIDED A QUESTION OF FEDERAL LAW IN A WAY THAT DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND ARTICULATES AN UNUSUALLY BROAD AND NOVEL VIEW OF STANDING.

The Court should grant this petition because this proceeding involves a question of exceptional importance, *i.e.*, Article III standing. The Ninth Circuit's opinion is in direct conflict with the "injury-in-fact," causation and redressibility requirements set forth in the Supreme Court decisions in *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992); *ASARCO Inc. v. Kadish,* 490 U.S. 605 (1989); *Allen v. Wright,* 468 U.S. 737 (1984); *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26 (1976); and *Warth v. Seldin,* 422 U.S. 490 (1975). The Ninth Circuit's opinion articulates an unusually broad and novel view of standing to litigate a substantive question in the federal courts. "A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas,* 495 U.S. 149, 155-56 (1990). The Ninth Circuit has done so here. As such, the Ninth Circuit is plainly wrong and strikes a serious blow to judicial efficiency and to the limits on judicial review. Such a broad interpretation of standing will result in a needless waste of judicial resources and unnecessary litigation. Moreover, the Ninth Circuit's interpretation completely undermines the "case-or-controversy" requirement of Article III of the U.S. Constitution.

The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan,* 504 U.S. at 560.

> The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy."

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1981) (quoting *Chicago & Grand Trunk Ry. v. Wellman,* 143 U.S. 339, 345 (1892)). In the instant case, respondent Bras can manufacture no real, earnest and vital controversy against the Commission.

II.

THE NINTH CIRCUIT'S RELAXATION OF THE INJURY-IN-FACT PRONG OF ARTICLE III STANDING UNDERMINES CONSTITUTIONAL STANDING REQUIREMENTS AND IMPERMISSIBLY EXPANDS FEDERAL COURT JURISDICTION.

The Ninth Circuit's opinion is in direct conflict with Supreme Court precedent on standing. The "irreducible constitutional minimum of standing" requires the demonstration of three elements:

> First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical'." Second, there must be a causal con-

> nection between the injury and the conduct complained of — the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-61 (alterations in original) (citations omitted). This Court has firmly established precedent that requirements for standing must be strictly enforced. *Griswold v. Connecticut,* 381 U.S. 479, 481 (1965). The Ninth Circuit has diverged from this principle in finding that Bras satisfies the injury-in-fact requirement. In so doing, the Ninth Circuit has enlarged limited federal court jurisdiction beyond the bounds contemplated by the framers of the U.S. Constitution.

It takes more than the mere allegation of a legal right to establish standing. In *Valley Forge Christian College,* 454 U.S. at 483, the Court declared that the "assertion of a right . . . cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." If the injury requirement is to have any meaning, Bras must unequivocally establish he has satisfied this essential requisite for going forward with his case. Bras has failed to do so. The Ninth Circuit's placing of its imprimatur upon this serious deficiency is an improper attempt to reach the merits of Bras' lawsuit in a rush to address a controversial topic. "The fundamental aspect of standing focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen,* 392 U.S. 83, 99 (1968).

A. Bras Failed to Show Actual or Imminent Injury.

To establish Article III standing, plaintiff must show an actual or imminent injury, fairly traceable to the challenged

agency action, and likely to be redressed by the relief sought. *Lujan,* 504 U.S. at 560-61. Of the three requirements, "the most important is the injury requirement." *Cone Corp. v. Florida Dep't. of Transp.,* 921 F.2d 1190, 1204 (11th Cir. 1991). Bras plainly has the burden of proof:

> The party invoking federal jurisdiction bears the burden of establishing these elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Lujan, 504 U.S. at 561 (citations omitted). The failure to satisfy the injury requirement goes to the heart of whether Bras has the right to go forward with his suit. Bras has utterly failed to meet this burden.

To satisfy the injury prong of Article III standing, the injury must be actual or imminent. *Whitmore,* 495 U.S. at 155. Bras' showing is insufficient to show either. First, Bras failed to show that he suffered actual injury. Bras admits that the settlement compensated him for past injury. E.R. 57, App. 33. Therefore, the settlement with Pacific Bell extinguished any claims for damages due to past injury. During the past three years since the award of the contracts, Bras suffered no actual injury. Bras was on the same footing with everyone else. There were no contracts being offered during that three year period, therefore, he cannot claim actual injury on that basis.[5]

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[5] *Cf., Nelson v. King County,* 895 F.2d 1248, 1251 (9th Circ. 1990). (Determination of standing cannot be based upon a naked statistical assertion); *cf., Adarand Constructors, Inc. v. Pena,* 115 S.Ct. 2097 (June 12, 1995), where recently the U.S. Supreme Court found standing where the Central Federal Lands Highway Division was likely to

The Ninth Circuit acknowledges that "[b]ecause Bras seeks declaratory and injunctive relief only, it is insufficient for him to demonstrate that he was injured in the past." *Bras,* 59 F.3d at 873, App. 9-10. This Court echoes that principle: "But as we explained in *Los Angeles v. Lyons,* 461 U.S. 95 (1983), the fact of past injury, while presumably affording [the plaintiff] standing to claim damages . . . , does nothing to establish a real and immediate threat that he would again suffer similar injury in the future." *Adarand Constructors, Inc. v. Pena,* 115 S.Ct. 2097, ____ (June 12, 1995) (citations omitted).

Where only injunctive or declaratory relief is sought, as in the instant case, a plaintiff must show a " 'very significant possibility' of future harm." *Coral Constr. Co. v. King County,* 941 F.2d 910, 929 (9th Cir. 1991) *cert. denied,* 502 U.S. 1033 (1992) (*"Coral Construction"*) (citation omitted). The alleged injury must be imminent or not so attenuated that it is unlikely to happen again.[6] The issue is whether Bras has made an adequate showing that in the near future he will bid on an architectural contract being offered by a California public utility, and the Code or Order will subject him to an immediate threat of injury to his equal protection right to bid on an equal footing with any other qualified architect. The plain answer is that Bras did not make such a showing. Nor could he, because there is nothing in the Code and Order that precludes Bras from competing on an equal footing.

This Court asserts that "[a]lthough 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to insure that the alleged injury is not too speculative for Article III purposes — that the injury is *'certainly* impending'. " *Lujan,* 504 U.S. at 565 n.2

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award contracts at least once a year and that Adarand was very likely to bid on such contract.

[6] *See Lyons,* 461 U.S. at 95; *see also, Whitmore,* 495 U.S. at 149.

(emphasis in original) (citing *Whitmore,* 495 U.S. at 158). Proof of a present intent to bid in the near future is essential to proving future injury. The Ninth Circuit acknowledges that Bras' complaint and summary judgment declaration do not assert that he presently intends to bid. *Bras,* 59 F.3d at 873, App. 11. Bras did not state with any certainty that he has definite plans of competing for assignments with Pacific Bell in the near future. Nor did he express any interest in seeking architectural work with any other California public utility.

Bras merely expressed a general desire "to reinstate [his] long term business relationship with Pacific Bell in the performance of architectural services to it **in the future,**" claiming to be "ready, willing and able to provide such services should [he] be given an opportunity to do so." E.R. 57 (emphasis added), App. 114. Bras' stated desire to do business with Pacific Bell "in the future" does not satisfy the imminence requirement for Article III standing. Neither Bras' complaint nor declaration or other supporting documentation establishes that Bras definitely intends to reinstate a business relationship with Pacific Bell in the near future. A history of business relationships in the past is no proof of intent to continue that relationship into the future.

Furthermore, the parroting of the phrase "ready, willing and able" in and of itself does not establish imminence. The Ninth Circuit makes much of this phrase, as well as a letter from Pacific Bell "indicating that Pacific Bell was pleased with his past work, would keep his information on file, and would consider him when it reevaluates its needs." *Bras,* 59 F.3d at 874, App. 12. This language of rejection is boilerplate, as anyone who has been rejected, laid off, or terminated can attest. This "evidence" in no way establishes the imminence required for Article III standing. If Bras is "ready, willing and able," there is nothing in the Code or Order that prevents him from going forward with a bid.

Bras' failure to state with specificity **when** he intends to offer his architectural services is a serious flaw in that it detracts from a showing of present intent to bid. Bras' statements amount to the "some day" intentions that this Court rejected in *Lujan*. The plaintiffs in *Lujan* submitted affidavits claiming an intent to revisit project sites at some time in the future where they presumably would be deprived of the opportunity to observe endangered animals. This Court has said that the expression of such an intent "is simply not enough. Such 'some day' intentions — without any description of concrete plans, or indeed even any specification of *when* the some day will be — do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan,* 504 U.S. at 564. The rationale behind the Court's insistence upon the injury being immediate is patently self-evident: "[W]e have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case to which no injury would have occurred at all." *Id.* at 565 n.2. Bras' alleged injury fails the immediacy test.

Moreover, Bras' claim is too speculative for Article III purposes. In the three years since Pacific Bell offered architectural contracts, many intervening events could have occurred. Pacific Bell could have changed its procurement program so that it would no longer be seeking a limited number of architectural firms with which to form business relationships, or it could have changed the way it administers its procurement program, events that are in no way connected to or mandated by the Code or Order. Indeed, what Pacific Bell may or may not do, now that the three years have elapsed, is completely speculative. In addition, Bras' intentions are similarly speculative. Bras may or may not be available or interested in bidding for Pacific Bell's or any other public utility's architectural contracts. In sum, Bras has failed to demonstrate a present, firm intent to bid. And any potential future injury that could occur is not of

sufficient immediacy to conclude that the alleged injury would be certain to happen again.

The Ninth Circuit relies on *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville,* 508 U.S. ____, 113 S.Ct. 2297 (June 13, 1993) *("Northeastern")* to support its ruling that Bras has standing to challenge the Code and Order. *Bras,* 59 F.3d at 873, App. 11. That reliance is misplaced. The ordinance in *Northeastern* and the Code and Order at issue here are vastly different. The original Jacksonville ordinance provided that 10 per cent of the dollars spent each year on city contracts be **set aside** for minority or women businesses. Northeastern, 113 S.Ct. at 2299. A new ordinance was enacted which was also a **set aside** in that it allowed the city to reserve contracts for the **exclusive competition of minority and women businesses.** *Id.* at 2300. By contrast, the Code and the Order unequivocally do not authorize or encourage preferences or set asides. Nor do they have that effect in their operation.

Neither does the Code or Order erect "a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Id.* at 2303. Nothing in the Code or Order prevents Bras from bidding on any public utility contract under the same terms as any other bidder. The crux of Bras' claim is not that he did not have an equal opportunity to bid, but that he did not win a bid.[7] Bras' claim that he lost work and will continue to lose work because of the WMBE program is unfounded. Bras

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[7] Pacific Bell's Mr. Behuresht stated in his deposition that even if the WMBE factor had been eliminated, Bras may not have won a bid. The selection of bid winners was not done strictly on a mathematical basis. E.R. 70-72, App. 103-105. Pacific Bell "put emphasis on expense of central office work and also administrative work and one of the objectives would have been for us to ensure that we had more than one firm that could deliver these types of services." E.R. 72, App. 105. Additionally, the size of Bras' small firm did not lend itself to handling the size of jobs that would be required of the limited number of firms with which

presented no evidence whatsoever to support this allegation. He pointed to no specific contract lost. *See Cone Corporation,* 921 F.2d at 1206. Moreover, any loss alleged has nothing to do with the Code or the Order. Bras presented no evidence that Pacific Bell would not have limited the number of architectural firms it used, notwithstanding the existence of the Code or Order.

B. By Reaching the Merits of Bras' Claim, the Ninth Circuit Exceeds the Sole Issue Before It and Enlarges the Court's Jurisdiction Where None Exists.

This Court has said that "Article III [standing] . . . is not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated. . . ." *Valley Forge Christian College,* 454 U.S. at 476. By addressing the merits of Bras' suit, the Ninth Circuit appears to have accommodated Bras' desire to have these matters adjudicated notwithstanding his failure to satisfy the jurisdictional requirement of injury-in-fact.

The sole issue before the Ninth Circuit was whether Bras had standing to pursue the equal protection claims he alleges in his lawsuit. While claiming that "[w]e express no opinion as to whether the Code or Order discriminates against Bras on the basis of race or gender," the Ninth Circuit's decision does just that. *Bras,* 59 F.3d at 875, App. 16. The Court stated that:

> [w]e are also unmoved by the Commission's argument that the Code and Order do not require public utilities to adopt discriminatory programs. While the Code and Order do not expressly state that public utilities must adopt any particular programs such as bidding preferences or set-

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Pacific Bell would do business under its streamlined procurement program.

> asides, they clearly have the practical effect of requiring them to do so.

Id. App. 15. This "practical effect" test is a novel one, and the Ninth Circuit cites no established legal standard for its wayward proposition.

The Ninth Circuit's decision far exceeded the standing issue which was the sole issue before it, by delving erroneously into the merits of Bras' claim. By so doing, it went beyond the bounds of federal court jurisdiction. Rather than concentrate on Bras' standing, the court forged ahead with a discussion of the substantive issues. By commenting on the merits of the case, the Ninth Circuit lost sight of the fundamental requisites essential for Article III standing. It papered over the standing issue in order to reach the controversial topic of affirmative action. Notwithstanding the timeliness of the topic, a federal court cannot run roughshod over jurisdictional requirements to address a claim if the plaintiff clearly does not have standing to bring the action. Bras is such a plaintiff.

III.

THERE IS NO CAUSAL NEXUS BETWEEN THE ALLEGED INJURY AND THE COMMISSION'S ENFORCEMENT OF THE CODE AND ORDER.

Even assuming *arguendo* that Bras satisfied the injury-in-fact prong, he still lacks standing under the well-settled rule that there must be a causal connection between the injury and the conduct complained of and that the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The Supreme Court has accommodated allegations of threatened injury in two settings where governmental

action is involved. *Wilderness Soc'y v. Griles,* 824 F.2d 4 (D.C. Cir. 1987). "The first setting involves cases in which the plaintiff alleges that governmental action will be taken directly against him." *Id.* at 11. The second setting, which is pertinent here,

> comprises cases in which the government acts directly against a third party, whose expected response in turn will injure the plaintiff. The standing question in these three-party cases frequently turns not on the existence of personal injury but rather on so-called causation issues, i.e., whether the third party's decision is sufficiently dependent upon the governmental action that plaintiff's injury is "fairly traceable" to that action and is "likely to be redressed" by an order binding the government.

Id. (footnote omitted). The plaintiff here is directly challenging the Code and Order, which solely establish voluntary goals and which absolutely **do not** compel regulated utilities to discriminate in their procurement of contracts and services. Here, it is the allegedly discriminatory **independent** actions of Pacific Bell, a utility regulated by the Commission, which are at issue, **independent** actions which were not dictated to by either the Code or Order.

The Ninth Circuit has failed to distinguish the facts of the instant case from *Coral Construction,* 941 F.2d at 910, and *Associated Gen. Contractors of California v. Coalition for Economic Equity,* 950 F.2d 1401 (9th Cir. 1991), *cert. denied,* 112 S.Ct. 1670 (1992), (*"AGCC II"*). In those cases, unlike here, the **government itself** adopted a program which **awarded** contracts that expressly included "bid preferences" or "set-asides" for minority and women-owned businesses. Here, in contrast, the Commission was not involved in any way in the procurement or award of contracting services to Bras, but has simply adopted an Order establishing general goals. Under the Code and Order, all

bidders have an equal opportunity to compete for utility contracts. The Code and Order do not set-aside any portion of utility procurement for the exclusive competition of WMBEs. Bras' action against Pacific Bell challenged the **utility's** contracting program implementing the Commission's Order. Bras settled that action. Bras' action against the Commission challenges only the Commission's Code and Order which solely establish goals.

In *Lujan,* this Court addressed the difficulty of demonstrating standing in contexts where the government regulates the conduct of third parties:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated or (regulable) third party to the government action or inaction — and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of

> KENNEDY, J.); see also *Simon*, [426 U.S.] at 41-42; and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. *E.g. Warth*, [422 U.S.] at 505. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily "substantially more difficult to establish."

Lujan, 504 U.S. at 561-62.

The Ninth Circuit simply failed to address this critical difference, i.e., that the instant case involves a third party actor, not before the Court. The Ninth Circuit's decision, therefore, conflicts with *Lujan* and with its own precedent in *Coral Construction and AGCC II* by impermissibly expanding the reach of these cases to the regulatory context, where the independent third party actor, here Pacific Bell, is not before the court and where the Code and Order are not responsible for the alleged injury. Such a broad interpretation of standing will result in a needless waste of judicial resources and unnecessary litigation and completely undermines the case or controversy requirement of Article III of the U.S. Constitution. To find a sufficient causal nexus under such circumstances puts unwarranted burdens on governmental regulatory bodies which will be placed in the untenable position of being held responsible for the independent actions of regulated entities, in situations where such entities' actions are inconsistent with the regulations under which they are bound or even where such actions may be illegal. Counsel has found no case in which a court has found standing on the basis of an alleged injury caused by a state's general requirement that independent third parties establish WMBE goals, where the particular procurement program at issue was that of a third party not before the court. Bras has settled his suit with Pacific Bell. Bras cannot

prove a sufficient causal nexus between the contested measures and his asserted injury that is traceable to the Commission.

Indeed, the most troubling aspect of the Ninth Circuit's erroneous conclusion that there is a sufficient nexus between Bras' asserted injury and the Commission's actions is the total lack of factual support for its conclusion. The Ninth Circuit states that "[b]ecause the Code and Order effectively encourage, if not compel, Pacific Bell to adopt discriminatory programs, there is a sufficient nexus between Bras's injury and the Commission's actions in enforcing the Code and implementing the Order." *Bras,* 59 F.3d at 875, App. 16. The majority overlooked critical evidence in the record which convincingly demonstrates the exact **opposite** conclusion.

Without any evidence to support its conclusion, the Ninth Circuit boldly asserts its unfounded conclusion that "[w]hile the Code and Order do not expressly state that public utilities must adopt any particular programs such as bidding preferences or set-asides, they clearly have the practical effect of requiring them to do so." *Id.*, App. 15. Not only is there no support in the record for this conclusion, but it completely misrepresents the Commission's WMDVBE program. Furthermore, the Ninth Circuit relies upon *Coral Construction and AGCC II* for the proposition that plaintiffs alleging equal protection violations need not demonstrate that rigid quotas make it impossible for them to compete for any given benefit, rather, they need only show that they are forced to compete on an unequal basis. *Id.* at 873, App. 10. Yet, inexplicably, the Ninth Circuit decision fails to address the fact that the statutory scheme set forth in the Code and Order provides that all bidders in utility

procurement compete on an equal basis.[8]The Ninth Circuit has overlooked conclusive evidence in the record that demonstrates the Commission's commitment to non-discrimination in its WMDVBE program. Each utility has its own program, with its own unique provisions. The Commission has not hesitated to evaluate the legality of specific provisions of a utility's program when the issue has come before the Commission. Indeed, in a previous decision, in response to a complaint filed with the Commission against Pacific Bell alleging discrimination, the Commission held that a utility which targets a particular minority group as the recipient of an advertising campaign may not limit its search for a WMBE advertising agency to an agency that is at least 51 percent owned and operated by members of the target group. *Muse Cordero Chen, Inc. v. Pacific Bell,* D.90-10-032, 38 Cal.P.U.C.2d 5 (1990), E.R. 159-169, App. 116-128. In that decision, the Commission differenti-

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[8] Notably, the *Bras* dissent argued that the challenged measures are different in critical ways from Jacksonville's program in *Northeastern,* 508 U.S. at ____, 113 S.Ct. at 2297, relied upon by the majority. The dissent stated that:

> [t]he Court noted that "in the context of a challenge to a set-aside program, the 'injury-in-fact' is the inability to compete on an equal footing in the bidding process. . . ." Therefore, the Court concluded, "a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." The Code and Order do not foreclose competition on an "equal footing," and they do not constitute a "discriminatory policy." The provisions themselves only require that utilities set goals, and "[a] goal is neither a requirement nor a quota." Cal. Pub.Util.Code § 1.3.13. [sic] [Order § 1.3.13]. Therefore, Bras cannot show that the Code or Order will injure him.

Bras, 59 F.3d at. 877-78 (citations omitted), App. 20-21.

ated between its statutes and regulations, and Pacific Bell's actions in violation thereof:

> Once again, we emphasize that while a utility may not arbitrarily exclude a class of persons on grounds unrelated to their qualifications, the utility retains its authority to use its legitimate business judgment to select the best person for the work at hand. Advertisers from the targeted community may have a natural advantage regarding cultural sensitivity. But members of all racial ethnic and national origin classifications must be allowed to compete; no one can be excluded because of an assumption that one class of persons is unable to understand another.

Id. (emphasis added), E.R. 168, App. 125-126. In addition, the Commission has also stated in a decision regarding inclusion of natural gas purchases in the WMBE program:

> We understand the concern that natural gas market uncertainty makes it impossible for utilities to be sure they can meet such a long-term goal, thus we remind the utilities that goals are just that — goals, and that if a utility cannot meet the goals it need only provide a reasonable explanation of its failure to do so. We emphasize that GO 156 does not create a set aside program for WMBEs, but rather simply opens the door for them to compete with established utility suppliers. If WMBEs cannot provide a needed product or service at a competitive price, they should not get the business.

Re Public Utilities Code Sections 8281 to 8285 Relating to Women and Minority Business Enterprises, D.90-12-027, 38 Cal. P.U.C.2d 384, 394 (1990). Clearly, the Code and Order do not require utilities to adopt any particular scheme, and clearly **do not** have the "practical effect" of

requiring utilities to adopt discriminatory programs. The dissent correctly perceived this fatal flaw in the majority's reasoning:

> The Code and the Order do nothing more than to require utilities to set goals for hiring women and minority contractors. The provisions do not imply or suggest, and certainly do not compel utilities to use discriminatory programs. ¶ The majority theorizes that because some utilities may have had nondiscriminatory outreach programs in place before the Code and Order were adopted, the "clear message" the Code and Order "may have sent" is that those programs were insufficient. The majority offers no legislative history, case law, affidavits nor any other evidence to support the majority's conjecture. Just as plausible an explanation is that the legislature wanted the utilities to direct their already sufficient efforts toward specific goals. ¶ Bras is challenging the actions of the Commission. The Commission's actions are not discriminatory, and there is not a sufficient nexus between the state's provisions and any future injury that Bras may incur from a utility's specific program.

Bras, 59 F.3d at 978-79, App. 23.

Bras simply cannot prove a sufficient causal nexus between any asserted future injury traceable to the Commission. Standing cannot be supported unless the injury alleged is fairly traceable to the government conduct that is challenged as unlawful. *See Allen v. Wright,* 468 U.S. at 757 (IRS' failure to deny tax-exempt status to discriminatory schools not fairly traceable to asserted injury); *Simon v. Eastern Kentucky,* 426 U.S. at 42-43 (hospitals' denial of care to indigent patients not fairly traceable to IRS ruling regarding hospitals' charitable corporation); *DeBolt v. Espy,*

47 F.3d 777 (6th Cir. 1995) (private developers' eviction of plaintiff not fairly traceable to Farmers Home Administration's ("FmHA") (housing policies).[9] Indeed, the requisite links in the chain of causation between the Code and Order and any potential future asserted injury are far too weak for the chain as a whole to sustain Bras' standing. *Allen,* 468 U.S. at 759.

CONCLUSION

Petitioner, the Commission, respectfully prays the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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November 13, 1995

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[9] *DeBolt* is especially relevant here, because, in DeBolt as in the instant case, plaintiff settled with the third party actors and continued in her claims against the FmHA.

APPENDIX

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LEGAL DIVISION

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. JACK BRAS, individually and doing business as J. Jack Bras & Associates,

Plaintiff-Appellant,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION,

Defendant-Appellee.

No. 93-15764
D.C. No.
CV-92-00304-WHO
OPINION

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, Jr., District Judge, Presiding

Argued and Submitted
December 13, 1994—San Francisco, California

Filed July 5, 1995

Before: J. Clifford Wallace, Chief Judge, Harry Pregerson and Robert R. Beezer, Circuit Judges.

Opinion by Chief Judge Wallace;
Dissent by Judge Pregerson

SUMMARY

Individual Rights/Constitutional Rights/ Civil Litigation and Procedure

The court of appeals reversed a district court judgment and remanded. The court held that a provider of architectural services has standing to seek declaratory and injunctive relief against the California Public Utilities Commission forbidding the Commission from implementing provisions of a "minority and women business enterprise" program.

The Women and Minority Business Enterprise Law, codified at § 8281-8286 of the California Public Utilities Code, requires certain electrical, gas and telephone corporations to submit annual plans for increasing women, minority and disabled veteran business enterprise procurement. The Code requires that annual plans be submitted by utilities that include short-term and long-term goals, but not quotas, and methods for encouraging prime contractors and grantees to engage women, minority and disabled veteran businesses in subcontracts. The California Public Utilities Commission implemented General Order 156, which requires utilities to set "substantial and verifiable" short-term, mid-term and long-term goals for utilizing minority businesses. The Order directs that a utility establish initial minimum long-term goals for major categories of products and services the utility purchases from outside vendors of not less than 15 percent for minority owned businesses and not less than five percent for women owned businesses. Although a utility may not be automatically sanctioned solely for failing to meet goals, the Commission may sanction a utility for failing to make acceptable progress in the hiring of minority businesses.

Appellant J. Bras provided architectural services to Pacific Bell. He was asked to complete a "pre-qualification criteria" form which was to be used by Pacific Bell to select a group of architectural firms to submit proposals and, if

selected, to enter into "improved business partnerships." Question 10 on the form asked if Bras was currently certified for Minority/Women Business Enterprise status. Bras answered the question in the negative and returned the form to Pacific Bell.

Pacific Bell informed Bras that Bras ranked sixth amongst the firms that had completed the forms, and Pacific Bell initiated negotiations with the top three ranked firms. Bras was informed that he would have ranked third had question 10 not been considered. The firm that finished third in the ranking was a minority-owned business. A Pacific Bell representative wrote to Bras, stating that the company will be happy to consider him in the future when its contract for architectural services is reevaluated.

Bras filed an action against Pacific Bell and the Commission, alleging that Pacific Bell discriminated against him on the basis of race and sex in violation of the Equal Protection Clause of the United States Constitution. Bras also charged that § 8281-8286 and Order 156 were unconstitutional and should be declared void. He sought a permanent injunction forbidding the Commission from implementing the provisions.

Bras settled his claims against Pacific Bell. The district court dismissed his remaining claims for declaratory and injunctive relief against the Commission for lack of standing. Bras appealed.

[1] Bras met his burden of demonstrating that he was "able and ready to bid on contracts" and that a discriminatory policy prevented him "from doing so on an equal basis." Bras may fill out a new qualification form when the three-year term of Pacific Bell's present business relationships expires. [2] Bras stated in his summary judgment declara-

tion that he desired to reinstate his business relationship with Pacific Bell in the future, and was "ready, willing and able" to provide services to Pacific Bell. Bras also submitted a letter from Pacific Bell indicating that the company will consider him when it revaluates its needs. This evidence was sufficient to establish, for purposes of summary judgment, that Bras would suffer future injury if the program was not enjoined.

[3] The Code and Order were not immunized from scrutiny because they purported to establish "goals" rather than "quotas." The economic realities of the program are to be looked at, rather than the label attached to it. [4] While in this case the Code and Order did not expressly state that public utilities had to adopt any particular programs such as bidding preferences or set-asides, they clearly had the practical effect of requiring them to do so. [5] Because the Code and Order effectively encouraged, if not compelled, Pacific Bell to adopt discriminatory programs, there was a sufficient nexus between Bras's injury and the Commission's actions in enforcing the Code and implementing the Order.

[6] Bras satisfied his burden of showing injury in fact and he had standing to seek declaratory and injunctive relief against the Commission.

Circuit Judge Pregerson dissented, stating that Bras cannot demonstrate future harm caused by the actions of the Commission.

COUNSEL

Pamela A. Lewis, Schneider & Wallerstein, San Jose, California, for the plaintiff-appellant.

Timothy E. Treacy, Public Utilities Commission of the State of California, San Francisco, California, for the defendant-appellee.

OPINION

WALLACE, Chief Judge:

Bras appeals from the district court's summary judgment in favor of the California Public Utilities Commission (Commission), dismissing his equal protection claims for lack of standing. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We reverse and remand.

I

From 1969 to 1991, Bras provided architectural services to Pacific Bell. Approximately 30 percent of Bras's gross receipts after 1983 came from work generated by Pacific Bell. On February 1, 1991, Bras was asked to complete a "pre-qualification criteria" form. The form was to be used by Pacific Bell to select a group of architectural firms to submit proposals and, if selected, to enter into "improved business partnerships." Question 10 on the form asked: "[A]re you currently certified through the Cordoba Corporation Clearing House process for Minority/Women Business Enterprise status?" Bras completed the form, answering question 10 in the negative, and returned the form to Pacific Bell on February 4, 1991.

In June 1991, Bras was informed by Pacific Bell that a business decision was made to work closely with a small number of suppliers in the San Francisco Bay Area and to develop working relationships with those firms over a period of time. Bras was told that Pacific Bell chose these suppliers

based on the information contained in the "pre-qualification criteria" form that Bras completed. Bras was also informed that 13 architectural firms had completed the forms, that Bras ranked sixth amongst all of those firms, that Pacific Bell initiated negotiations with the top three ranked firms, and that Bras would have ranked third instead of sixth had question 10 not been considered. In fact, however, Pacific Bell gave ten points for answering question 10 with a "yes" and zero points for answering question 10 with a "no." The firm that finished third in the ranking was a minority-owned business.

In response to Bras's inquiries concerning the selection process and the reason why he was eliminated from consideration for an "improved business partnership," a representative of Pacific Bell wrote to Bras, stating: "I would like to assure you that your firm was very competitive and was not eliminated due to any unsatisfactory performance.... Again, I appreciate your interest and the many contributions to our business. We plan to maintain your information on file and will be happy to consider Bras & Associates when our contract for architectural services is reevaluated in the future."

On January 10, 1992, Bras filed this action pursuant to 42 U.S.C. §§ 1981, 1983, and 1985 against Pacific Bell and the Commission. Bras alleged that Pacific Bell discriminated against him on the basis of race and sex in violation of the Equal Protection Clause of the United States Constitution. Bras also charged that sections 8281-8286 of the California Public Utilities Code (Code) and the Commission's General Order 156 (Order) are unconstitutional and should be declared void, and sought a permanent injunction forbidding the Commission from implementing these provisions.

For many years, the Commission has overseen programs to increase the participation of minority-owned and women-owned businesses in public utility contracting. Before 1986, the Commission simply required public utilities to maintain public outreach programs which encouraged and assisted minority-owned and women-owned businesses to compete for contracts with public utilities. In 1986, however, the California Legislature passed the Women and Minority Business Enterprise Law, which is codified at sections 8281-8286 of the Code.

Section 8283(a) requires "each electrical, gas, and telephone corporation with gross annual revenues exceeding twenty-five million dollars . . . to submit annually, a detailed and verifiable plan for increasing women, minority, and disabled veteran business enterprise procurement in all categories." Cal. Pub. Util. Code § 8283(a) (West 1993). A "minority business enterprise" is one where at least 51 percent of the enterprise is owned by a minority group or groups. *Id.* § 8282(b). Utilities are required by the Code to "presume that minority includes Black Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans." *Id.* The Code also requires that annual plans be submitted by utilities that include "short- and long-term goals and timetables, but not quotas, and . . . methods for encouraging both prime contractors and grantees to engage women, minority, and disabled veteran business enterprises in subcontracts." *Id.* § 8283(b). The Commission is directed to "establish guidelines" to help utilities establish programs pursuant to the Minority Business Enterprises section of the Code. *Id.* § 8283(c).

Pursuant to Code § 8283(c), the Commission implemented the Order, which requires utilities to set "substantial and verifiable short-term (one year), mid-term (three

years), and long-term (five years) goals for the utilization of" minority businesses, *Id.* § 8. It specifically directs that "[e]ach utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases from outside vendors of not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises." *Id.* § 8.2. A "goal" is defined as a "target which when achieved, indicates progress in a preferred direction. A goal is neither a requirement nor a quota." *Id.* § 1.3.13. Although a utility cannot automatically be sanctioned solely for failing to meet goals, the Commission may, after conducting an investigation, sanction a utility for failing to make acceptable progress in the hiring of minority businesses, *Id.* § 8.12. The Commission concedes that it could sanction a utility by reducing its rate of return.

Bras settled all of his claims against Pacific Bell. On November 25, 1992, the settlement agreement was placed under seal by the district court. Bras's only remaining claims are for declaratory and injunctive relief against the Commission. The district court dismissed these claims for lack of standing.

II

We review the district court's summary judgment de novo. *First Pacific Bank v. Gilleran*, 40 F.3d 1023, 1024 (9th Cir. 1994). Our role is to determine whether, viewing the evidence in the light most favorable to the nonmoving party, there is a genuine issue of material fact for trial and whether the district court correctly applied the law. *Id.* We may affirm on any ground supported by the record even if it differs from that of the district court. *Id.*

There are three requirements for Article III standing: (1) injury in fact, which means an invasion of a legally

protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, which means that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, which means that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (*Lujan*). The party invoking federal jurisdiction bears the burden of establishing each of these elements. *Id.* "Each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* In order to defeat a summary judgment motion, the nonmoving party may not simply rely on his pleadings but must present some evidence on every material issue for which he will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Thus, Bras will defeat summary judgment if he has presented some evidence establishing each of the three requirements for Article III standing.

III

The Commission contends that Bras failed to meet the "injury in fact" requirement because he has not demonstrated the loss of any future business. The Commission argues that there is no evidence that Bras intends in the future to bid on work for Pacific Bell or any other public utility subject to the Code or Order, and that Bras has, in any event, been excluded from consideration by Pacific Bell as a result of the settlement.

Because Bras seeks declaratory and injunctive relief only, it is insufficient for him to demonstrate that he was injured in the past; he must instead show a very significant possibility of future harm in order to have standing. *Coral Construction v. King County*, 941 F.2d 910, 929 (9th Cir. 1991) (*Coral Construction*), *cert. denied*, 502 U.S. 1033 (1992).

In both *Coral Construction* and *Associated General Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991) (*Associated General*), *cert. denied*, 112 S. Ct. 1670 (1992), we concluded that contractors had standing to challenge programs that gave preferences to minority- and women-owned businesses for public contract awards. The programs essentially gave minority- and women-owned businesses a 5% bidding preference. In other words, the lowest bid would be accepted unless a minority- or women-owned business was within 5% of the bid price. *See Coral Construction*, 941 F.2d at 914; *Associated General*, 950 F.2d at 1404. In both cases, we concluded that the plaintiffs did not have to prove that they would lose any bids or identifiable contracts in order to sustain actual injury. We explained in *Coral Construction* that "[a]s a result of the objectively unequal bidding process under the preference method of awarding contracts, an injury results not only when Coral Construction actually loses a bid, but every time the company simply places a bid." 941 F.2d at 930. Similarly, in *Associated General* we stated: "the mere fact that [Associated General] members cannot play on an even field against [Minority Business Enterprises] subjects them to a legally cognizable injury." 950 F.2d at 1407. Under *Coral Construction* and *Associated General*, plaintiffs alleging equal protection violations need not demonstrate that rigid quotas make it impossible for them to compete for any given benefit. Rather, they need only show that they are forced to compete on an unequal basis.[4]

The Supreme Court recently adopted our analysis of the injury in fact requirement as it applies in equal protection cases in *Northeastern Florida Contractors v. City of Jacksonville,* 113 S. Ct. 2297 (1993) (*Northeastern Florida*). The Supreme Court stated:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Id. at 2303. Under *Northeastern Florida,* Bras need only demonstrate that he is "able and ready to bid on contracts and that a discriminatory policy prevents [him] from doing so on an equal basis." *Id.*

[1] We conclude that Bras has met this burden. Bras's complaint and summary judgment declaration do not assert that he presently intends to submit bids to Pacific Bell. However, Bras cannot presently "bid" on future projects for Pacific Bell because Pacific Bell has entered into long-term business relationships with three architects that are now used for all of its architectural service needs. Bras can, however, fill out a new qualification form when the three-year term of Pacific Bell's present business relationships expires. That Bras can only compete for long-term contracts every several years rather than on a project-by-project basis does not change the analysis.

[2] Bras states in his summary judgment declaration, which was subsequent to his settlement with Pacific Bell, that: "I *earnestly desire* to reinstate my long term business relationship with Pacific Bell . . . in the future and *stand ready, willing and able* to provide such services should I be given an opportunity to do so." (Emphasis added.) Bras also submitted a letter from Pacific Bell indicating that Pacific Bell was pleased with his past work, would keep his information on file, and would consider him when it reevaluates its needs. This evidence is sufficient to establish, for purposes of summary judgment, that Bras will suffer future injury if the program is not enjoined.

In deciding whether Bras has standing, we must consider the allegations of fact contained in Bras's declaration and other affidavits in support of his assertion of standing. *See Warth v. Seldin,* 422 U.S. 490, 501 (1974) (*Warth*). We are required to view the evidence in the light most favorable to Bras because we are reviewing a summary judgment entered against him on the basis of lack of standing. *Fors v. Lehman,* 741 F.2d 1130, 1132 (9th Cir. 1984); *see also Warth,* 422 U.S. at 501 (when addressing motion to dismiss for lack of standing, both district court and court of appeals must accept as true all material allegations of the complaint and must construe the complaint in favor of the party claiming standing). Thus, we must presume that Bras's declaration is truthful and that he is willing, ready, and able to do work for Pacific Bell in the future should he be given the opportunity. Nothing in the record indicates that this is not so. Viewing the evidence in the light most favorable to Bras, we must also accept as true the evidence in the record that Pacific Bell was satisfied with Bras's past performance and that it promised to keep his information on file and to consider him when Pacific Bell reevaluates its needs. This evidence shows that there will be future competitions to

provide architectural services to Pacific Bell and that Bras will be eligible to participate. There is no evidence in the record indicating that the settlement with Pacific Bell prevents Bras from competing for future contracts. Moreover, Bras would have been one of the three firms considered for work by Pacific Bell had Pacific Bell not been forced to implement a Minority Business Enterprise program under the Code and Order. Given all of this evidence, we cannot assume that Bras would suffer no future injury by the ongoing implementation of the program. To the contrary, viewed in the light most favorable to Bras, the evidence indicates that there is a significant likelihood that he will suffer future injury if the program is not enjoined.

IV

The Commission further contends that Bras lacks standing because the Code and Order do not themselves contain any race or gender specific discriminatory devices such as preferences or set-asides pursuant to which Bras could be denied equal treatment. Although the Commission couches this argument in terms of the "injury in fact" requirement, this argument implicates not only the "injury in fact" requirement but also the interrelated requirements that there be a causal relationship between the injury and the challenged conduct and that the injury will be redressed by a favorable decision. *Lujan,* 112 S. Ct. at 2136.

[3] The Code and Order are not immunized from scrutiny because they purport to establish "goals" rather than "quotas." We look to the economic realities of the program rather than the label attached to it. During the pendency of the *Northeastern Florida* litigation, a new ordinance was adopted that "established 'participation goals' ranging from 5 to 16% ... [and] provides not one but five alternative

methods for achieving the 'participation goals.' " *Id.* at 2300. Nevertheless, the Court explained that the replacement of the old statue with the new one did not make the case moot, because "[t]he gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts. The new ordinance may disadvantage them to a lesser degree than the old one, but insofar as it accords preferential treatment to black- and female-owned contractors . . . it disadvantages them in the same fundamental way." *Id.* at 2301. The ordinance at issue in *Northeastern Florida* did not *require* the use of set-asides, it merely authorized them. The Code and Order at issue here do nothing less. As *Northeastern Florida* shows, the relevant question is not whether a statute "requires" the use of such measures, but whether it authorizes or encourages them.

Other circuits, both prior to and since *Northeastern Florida,* have also concluded that the label attached to the program does not change the standing analysis. In *Concrete Works of Colorado v. Denver,* 36 F.3d 1513 (10th Cir. 1994), *cert. denied,* 115 S. Ct. 1315 (1995), the Tenth Circuit concluded that a nonminority prime contractor had standing to challenge a Denver ordinance that established "goals" for minority participation in city projects. The ordinance in *Concrete Works* directed the Office of Contract Compliance "to establish goals, on a project-by-project basis, for the participation level of [Minority and Women Business Enterprises] in city projects." *Id.* at 1516. Project goals were not required for every project, and project goals were often set at levels below the annual goals level. A prime contractor owned by a white male brought an action seeking both damages and injunctive relief. The Tenth Circuit correctly explained that "so long as the nonminority contractor can show that it was 'able and ready to bid' on a contract subject to the ordinance, the requisite 'injury in

fact' under Article III arises from an inability to 'compete [with minority contractors] on an equal footing' due to that ordinance's discriminatory policy." *Id.* at 1518, *citing Northeastern Florida,* 113 S. Ct. at 2303. *Concrete Works* further supports the conclusion that a program that establishes "goals" rather than rigid "quotas" can still cause "injury in fact." *See also Adarand Constructors v. Pena*, 63 U.S.L.W. 4523 (U.S. June 12, 1995) (nonminority subcontractor has standing to challenge the validity of a federal program pursuant to which prime contractors for highway projects were given an additional 1% of the bid price if the contractor met relevant "goals" for the hiring of minority subcontractors); *Harrison & Burrows Bridge Constructors v. Cuomo*, 981 F.2d 50 (2d Cir. 1992) (nonminority prime contractor had standing to challenge a state program requiring prime contractors to submit a "utilization plan" outlining the participation of minority and women-owned businesses and requiring such contractors to make "good faith efforts" to comply with project "goals" established by the contracting agency).

[4] We are also unmoved by the Commission's argument that the Code and Order do not require public utilities to adopt discriminatory programs. While the Code and Order do not expressly state that public utilities must adopt any particular programs such as bidding preferences or set-asides, they clearly have the practical effect of requiring them to do so.

[5] The Order requires utilities to establish "substantial and verifiable" short-term, medium-term, and long-term goals, and to set a minimum initial long-term "goal" of purchasing at least 15% of each major category of products and services from minority-owned businesses and 5% from women-owned businesses. The Commission also monitors

each utility's "progress" and can sanction a utility for failing to make acceptable progress by reducing its rate of return. Considering that the utilities already had nondiscriminatory outreach programs in place to encourage and assist minority-and women-owned businesses to compete for contracts before the adoption of the Code and Order, the clear message sent to the utilities by their adoption may have been that racially neutral outreach programs were insufficient. Because the Code and Order effectively encourage, if not compel, Pacific Bell to adopt discriminatory programs, there is a sufficient nexus between Bras's injury and the Commission's actions in enforcing the Code and implementing the Order.

V

[6] We express no opinion as to whether the Code or Order discriminates against Bras on the basis of race or gender. All we hold is that he has standing to raise the claims. Bras, like any person alleging discrimination, must satisfy no less or more than what Article III requires. We conclude that Bras has satisfied his burden of showing injury in fact and that he has standing to seek declaratory and injunctive relief against the Commission.

REVERSED AND REMANDED.

PREGERSON, Circuit Judge, dissenting:

As a plaintiff who seeks injunctive or declaratory relief, Jack Bras "must show 'a very significant possibility' of future harm in order to have standing to bring suit." *Coral Construction Co. v. King County*, 941 F.2d 910, 929 (9th Cir. 1991) (quoting *Nelsen v. King County*, 895 F.2d 1248, 1250 (9th Cir. 1990)), *cert. denied*, 112 S. Ct. 875 (1992). Because Bras cannot demonstrate future harm caused by

the actions of the California Public Utilities Commission ("Commission"), I dissent.

The majority relies on *Northeastern Fla. Gen. Contractors v. Jacksonville*, 113 S. Ct. 2297, 2303 (1993), for its contention that Bras, who settled with Pacific Bell, has standing in his lawsuit against the Commission to challenge provisions—General Order 156 ("Order") and Cal. Pub. Util. Code § 8283 ("Code")—that require contractors to establish goals for women and minority participation in California public contracting. The original Jacksonville ordinance at issue in *Northeastern*, 113 S. Ct. at 2303, provided that 10 percent of the amount spent each year on city contracts be set aside for minority or women businesses. After the Supreme Court granted certiorari, Jacksonville repealed the ordinance and replaced it. The new ordinance set goals for minority and women contractor participation and specified five methods for achieving those goals. The city decided which method it would use on a contract by contract basis. One of the methods, the "Sheltered Market Plan," was a " 'set-aside' by another name," which allowed the city to reserve contracts for the exclusive competition of minority and women businesses. *Id.* at 2301. The Court held that "when the government erects a barrier" that gives one group an advantage in obtaining a benefit, someone not in that group seeking to challenge that barrier does not need to allege that he or she would have obtained the benefit but for the barrier. The Court reasoned that the "injury in fact" in that type of an equal protection case is the denial of equal treatment, not the ultimate inability to obtain the benefit. *Id.* at 2303.

Northeastern does not support the majority's position that Bras has standing in this action against the Commission. First, Bras cannot prove an "injury in fact." He cannot show

a "very significant" possibility of future injury because any possibility of injury is too speculative to warrant judicial scrutiny. Further, because the Code and Order do not "erect[ ] a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group," *id.*, the provisions do not disadvantage Bras. Second, Bras cannot fulfill another requirement of standing, the necessary causal nexus between his alleged injury and the defendant's conduct.

I.

Bras's future injury is too "hypothetical" to warrant judicial review. *United Public Workers of America v. Mitchell*, 330 U.S. 75, 90 (1947): First, and most important, there are no current Pacific Bell projects on which Bras can bid. The majority notes that Pacific Bell has already entered into three-year contracts with several architects. The first time Bras will have a chance even to apply to be a candidate for an "improved business relationship" is at the end of Pacific Bell's *three year cycle.*

In contrast, the regular bidding process in *Northeastern* meant that the contractors would bid, and therefore be injured, again in the very near future. In *Northeastern*, the Supreme Court found that "[i]n its complaint, petitioner alleged that its members regularly bid on construction contracts in Jacksonville, and that they would have bid on contracts set aside pursuant to the city's ordinance were they so able." *Northeastern*, 113 S. Ct. 2304. In fact, the Court distinguished an earlier Supreme Court case, *Warth v. Seldin*, 422 U.S. 490, 516 (1975), on this basis. The Court explained, that unlike the contractors in *Northeastern*, the plaintiffs in *Warth* did not have standing because they did not allege that any contractor "ha[d] applied . . . for a

building permit or a variance with respect to any *current* project." *Northeastern*, 113 S. Ct. at 2304 (emphasis added) (quoting *Warth*, 422 U.S. at 516). The Court concluded that, unlike the petitioner in *Warth*, the contractors in *Northeastern* alleged an injury of "sufficient immediacy" to warrant standing. *Id.* (quoting *Warth*, 422 U.S. at 516).

Here no Pacific Bell project is "currently proposed," and Bras cannot show an injury of "sufficient immediacy." *Id.* (quoting *Warth*, 422 U.S. at 516). A delay of three years makes Bras's alleged injury unreasonably abstract. And because Bras did not allege that he planned to work with any other utility, his relationship with Pacific Bell is all we can evaluate. In short, Bras's alleged injury is not "actual or imminent," as it must be to form the basis for standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

Moreover, Bras's future intentions are unclear. As the district court noted, Bras made no statement in his complaint that he intends to bid for future contracts from any public utility. His only statement to that effect came after he settled with Pacific Bell. In his declaration in support of his motion for summary judgment, Bras stated that he "earnestly desire[s]" to reinstate his long term business relationship with Pacific Bell and is "ready" and "able" to provide architectural services if he is given "the opportunity to do so." [E.R. 57] But Bras does not say that he *will apply* for another long term contract with Pacific Bell, and he does not specify *when* he will apply. In the context of an ongoing bidding process, contractors need only allege that they are "ready" and "able" to bid, because their regular conduct is sufficient evidence of their future intentions. *Northeastern*, 113 S. Ct. at 2303. Without such a process, however, these

words are insufficient. Plaintiffs, like Bras, must allege "concrete" plans and specify when they will expose themselves to injury again. *Lujan*, 504 U.S. at 564 (holding that plaintiffs who had no "current" or "concrete" plans to visit site where injury to them would occur did not have standing).

Last, Bras has failed to present any evidence to suggest that Pacific Bell would consider hiring him again after settling his claims. The majority refers to a letter Bras received from Pacific Bell, indicating that it would "maintain [his] information on file," [E.R. 119], but the opinion fails to note that Pacific Bell sent that letter *before* the parties reached a settlement. Thus, Bras has not shown an injury of "sufficient immediacy and ripeness to warrant judicial intervention." *Northeastern*, 113 S. Ct. at 2304 (quoting *Warth*, 422 U.S. at 516).

II.

Even if Bras could demonstrate that he would be in a position in the future to be injured by the Code and Order, he would not be able to prove "a very significant possibility" of future harm, *Coral Construction*, 941 F.2d at 929 (quoting *Nelsen*, 895 F.2d at 1250), because the challenged Code and Order in the instant case have not "erect[ed] a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Northeastern*, 113 S. Ct. at 2303.

The challenged measures are different in critical ways from Jacksonville's program in *Northeastern*. The Supreme Court based its holding in *Northeastern* expressly on the fact that the Jacksonville ordinance contained a set-aside program. The Court noted that "in the context of a challenge to a set-aside program, the 'injury-in-fact' is the inability to

compete on an equal footing in the bidding process. . . ." *Id.* Therefore, the Court concluded, "a party challenging a *set-aside program like Jacksonville's* need only demonstrate that it is able and ready to bid on contracts and that a *discriminatory policy* prevents it from doing so on an equal basis." *Id.* (emphasis added). The Code and Order do not foreclose competition on an "equal footing," and they do not constitute a "discriminatory policy." The provisions themselves only require that utilities set goals, and "[a] goal is neither a requirement nor a quota." Cal. Pub. Util. Code § 1.3.13. Therefore, Bras cannot show that the Code or Order will injure him.

The majority's contention, that the measures at issue are similar to the program in *Northeastern* because both "authorize" the use of set-asides but do not require them, is specious. First, in *Northeastern*, the set-aside program was an explicit option which the defendant, the *city itself*, could employ at any given time. In contrast, the defendant here, the Commission, does not operate any procurement programs whatsoever, discriminatory or otherwise. Second, nothing in the language of the Code or Order alludes to any type of set-aside scheme. The Supreme Court in *Northeastern*, 113 S. Ct. at 2303, based its conclusion on the fact that set-asides were an explicit option under the city ordinance. The contested measures here involve no preferences or quotas. They do not dictate the use of any particular programs and do not themselves constitute a program. They do not deny Bras, or anyone, equal treatment. In the instant case, unlike in *Northeastern*, the "government" has not "erect[ed] a barrier." *Id.*

Attempting to draw a further parallel to *Northeastern*, the majority states that "[w]hile the Code and Order do not expressly state that public utilities must adopt any particular

programs such as bidding preferences or set-asides, they clearly have the practical effect of requiring them to do so." The majority cites no evidence to support this conclusion, nor could it, as none exists in the record. Utilities are not "required" to adopt any particular scheme, only goals. Neither the Code nor the Order specify how those goals should be met nor even dictate that they be met. Utilities are free to adopt completely gender and race-neutral schemes. For example, a program that aided inexperienced contractors with the bidding process might have the effect of achieving the Code and Order goal of increasing women and minority participation in procurement while treating all inexperienced contractors, white and minority, men and women, exactly alike. Moreover, the criteria for successful bidders remain unchanged and are entirely race and gender neutral. If Bras were to participate under such a program, he would suffer no equal protection harm.

If Bras wanted to challenge a particular race or gender-conscious program, one that might "make it more difficult for members of one group to obtain a benefit than it is for members of another group," *id.*, he could bring an action against the utility that developed the program. But no utility is a defendant in this action; Bras settled all his claims with Pacific Bell and has not questioned any other utility's contracting policy. Bras's suit against the Commission only challenges the Order and the Code, measures that mandate goals alone.

III.

In addition to lacking a constitutionally adequate "injury in fact," Bras cannot prove a sufficient causal nexus between the contested measures and his injury. In other words, an

injury must be "fairly . . . trace[able] to the challenged action of the defendant . . . ." *Lujan,* 504 U.S. at 560.

The majority attempts to gloss over this issue by stating that "[b]ecause the Code and Order effectively encourage, if not compel, Pacific Bell to adopt discriminatory programs, there is a sufficient nexus between Bras's injury and the Commission's actions in enforcing the Code and implementing the Order." This conclusion is unsupportable. The Code and the Order do nothing more than to require utilities to set goals for hiring women and minority contractors. The provisions do not imply or suggest, and certainly do not compel utilities to use discriminatory programs.

The majority theorizes that because some utilities may have had nondiscriminatory outreach programs in place before the Code and Order were adopted, the "clear message" the Code and Order "may have sent" is that those programs were insufficient. The majority offers no legislative history, case law, affidavits nor any other evidence to support the majority's conjecture. Just as plausible an explanation is that the legislature wanted the utilities to direct their already sufficient efforts toward specific goals.

Bras is challenging the actions of the Commission. The Commission's actions are not discriminatory, and there is not a sufficient nexus between the state's provisions and any future injury that Bras may incur from a utility's specific program. Just as in *Allen v. Wright,* 468 U.S. 737, 759 (1984), in which minority parents challenged the IRS's failure to deny tax-exempt status to discriminatory schools, here also the "links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain . . . standing." In *Allen,* the Court noted that the minority children's inability to receive an integrated education was

related only by way of intermediary parties, the private discriminatory schools, and speculative reasoning as to the effect of the prevailing decisions. *Id.* at 758-59. The same is true here. Bras's future injury, if any, would be traceable to the contracting process of a utility, which very well may not be a product of the provisions he now challenges, and would not necessarily be changed if the Code and Order were struck down. *See also Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 42-43 (1976) (hospitals' denial of care to indigent patients not fairly traceable to IRS ruling regarding hospitals' charitable corporation tax status).

IV.

The likelihood of future injury in the instant case is far too remote to meet established constitutional standards. Standing is founded "in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth,* 422 U.S. at 498. When an individual seeks to avail himself of the federal courts to determine the validity of a legislative action, he must show that he "is immediately in danger of sustaining a direct injury." *Ex parte Levitt,* 302 U.S. 633, 634 (1937). This requirement is necessary to ensure that "federal courts reserve their judicial power for 'concrete legal issues, presented in actual cases, not abstractions.' " *Associated General Contractors of California v. Coalition for Economic Equity,* 950 F.2d 1401, 1406 (9th Cir. 1991) (quoting *United Public Workers,* 330 U.S. at 89), *cert. denied,* 112 S. Ct. 1670 (1992). Bras offers us a hypothetical injury, abstract in nature. We should not exceed our judicial authority by holding that he has standing.

FILED
MAR 18 1993
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DO NOT PUBLISH

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

J. JACK BRAS, individually and doing business as J. Jack Bras & Associates,
Plaintiff,

vs.

PACIFIC BELL, a Corporation, CALIFORNIA PUBLIC UTILITIES COMMISSION, PHILIP BREMOND in his representative capacity as MWDVBE Program Manager for the California Public Utilities Commission, NEAL SHULMAN in his representative capacity as Executive Director of the California Public Utilities Commission,
Defendants.

No. C-92-0304 WHO

MEMORANDUM DECISION AND ORDER

ENTERED IN CIVIL DOCKET MAR 24, 1993

Plaintiff, J. Jack Bras, individually and doing business as J. Jack Bras & Associates ("plaintiff"), brought suit against Pacific Bell, the California Public Utilities Commission ("CPUC"), and two individual defendants,[1] alleging that Pacific Bell's Women and Minority Business Enterprises program violated plaintiff's statutory and constitutional rights. Plaintiff alleged a conspiracy between Pacific Bell and the CPUC defendants, and alleged further that a provision of California's public utility law violates the Equal Protection Clause; that provision requires the CPUC to encourage certain public utilities, including Pacific Bell, to adopt plans that will increase economic opportunity for women, minorities, and disabled veterans.

Following a settlement conference before Magistrate Judge Joan S. Brennan, plaintiff and Pacific Bell settled. On November 25, 1992, the Court entered an order dismissing Pacific Bell and placing the record of the settlement conference under seal. Presently before the Court are plaintiff's and the CPUC defendants' cross-motions for summary judgment. For the reasons hereinafter stated, plaintiff's motion for summary judgment against the CPUC defendants is denied, the CPUC defendants' motion for summary judgment against plaintiff is granted, and the action is dismissed with prejudice.

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[1] The individuals, both of whom are named in their representative capacities, are Philip Bremond, MWBE Program Manager for the CPUC, and Neal Shulman, Executive Director of the CPUC. (The CPUC and Bremand and Shulman are referred to collectively as the "CPUC defendants.")

I.

A.

Plaintiff is a white male who earns his living as a licensed architect. From 1969 until early 1991, plaintiff provided architectural services to Pacific Bell. The relationship with Pacific Bell was a good one from plaintiff's perspective because approximately 30 percent of his gross receipts after 1983 were generated by dealings with Pacific Bell.

On February 1, 1991, Paula Knapp, a Pacific Bell contract manager, wrote to plaintiff and asked him to complete a "pre-qualification criteria" form. Knapp wrote that Pacific Bell was sending the form to all firms that had provided architectural services to Pacific Bell's real estate management organization in the Bay Area. Knapp informed plaintiff that Pacific Bell would use the responses to select a final group of architectural firms that would be asked to submit "comprehensive proposals." From that final group, Pacific Bell would select several Bay Area architectural firms with which it would enter into "improved business partnerships."

On February 4, 1991, plaintiff returned the completed "pre-qualification criteria" form to Pacific Bell. Question 10 of that form asked "are you currently certified through the Cordoba Corporation Clearing House process for Minority/ Women Business Enterprise status?" Plaintiff answered this question in the negative.

In June 1991, plaintiff wrote to Pacific Bell, complaining that he had noticed a decrease in his business with the company. The following month, Jack Behseresht, Pacific Bell's director of project management for real estate, responded to plaintiff's letter. Behseresht informed plaintiff that Pacific Bell had made a business decision to reduce the number of outside firms in the Bay Area it would retain for architectural services; according to Behseresht, Pacific Bell believed that successful business relationships could best be

developed by working closely with a small number of suppliers who would become Pacific Bell's "business partners" over a period of time. He informed plaintiff that the process Pacific Bell used to select the firms with which it would continue to do business included the information plaintiff had provided in the pre-qualification criteria form. Behsereshtalso informed plaintiff that his firm was very competitive and was not eliminated due to any unsatisfactory performance.

Plaintiff thereafter discovered that Pacific Bell had received "pre-qualification criteria" forms from thirteen architectural firms in the Bay Area. Pacific Bell converted the responses on these forms to a numerical scale, assigning different "weights" to the various criteria.[2] Pacific Bell totalled each firm's points and then "ranked" the thirteen firms from most to least total points; it then pursued negotiations with the top three firms. Plaintiff ranked sixth out of thirteen. He took issue with several of the evaluations given him,[3] but none more so than his evaluation on the "M/WBE" criterion.

The "M/WBE" criterion measured whether a firm qualified for minority or women business enterprise status. Pacific Bell determined the number of points a firm received for this criterion based on the firm's response to question 10 of the "pre-qualification criteria" form: if the firm answered "yes," it received 10 points; if the firm answered "no" (as plaintiff did), it received zero points. If the "M/WBE" criterion had not been used, and if all other criteria had been weighted as

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[2] Thus, Pacific Bell assigned a possible 25 points to the "Quality of Past Performance" and "Central Office Design Experience" categories, but only a possible 5 points to categories such as "Number of Years in Business" and "Size of Organization." The maximum score any firm could receive was 95.

[3] For example, plaintiff took issue with his score of 20.2, out of a possible 25, in the category "Quality of Past Performance."

they were in the final report, plaintiff would have finished third; hence, he would have been eligible to proceed to the next round of negotiations with Pacific Bell and possibly would have entered into an "improved business partnership" with it.[4] Intergraph, the firm that did finish third in the overall ranking (and that proceeded to the final selection process) is owned by George Grover, who is an Asian American. Intergraph received 10 points on the "M/WBE" criterion.

Plaintiff thought Pacific Bell's selection process more than unfair; he believed it was tainted by racial discrimination and violated his rights under the Fourteenth Amendment's Equal Protection Clause. On January 10, 1992, plaintiff filed this action under 42 U.S.C. §§ 1981, 1983, and 1985, against Pacific Bell, the CPUC, and two of the CPUC's officials.[5] Plaintiff claimed that Pacific Bell had discriminated against him, under color of state law, on the basis of his race, and that Pacific Bell's actions violated the Equal Protection Clause, § 1983, and two provisions of the California Constitution.

B.

With respect to the CPUC defendants, plaintiff took issue with the "Women and Minority Business Enterprises" section ("WMBE") of California's Public Utilities Code. Cal. Pub. Util. Code §§ 8281-8286 (West Supp. 1993). Section 8283(a) of the WMBE direct the CPUC to "require each electrical, gas, and telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000) . . . to submit annually, a detailed and verifia-

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[4] Although it is not certain that Pacific Bell would have selected plaintiff as a "finalist" had he ranked third, it is established that the three firms with the highest rankings all were selected as finalists.

[5] *See* note 1 *supra.*

ble plan for increasing women, minority, and disabled veteran business enterprise procurement in all categories."[6] A "minority business enterprise" is

> a business enterprise that is at least 51 percent owned by a minority group or groups; or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more than one minority groups, and whose management and daily business operations are controlled by one or more of those individuals.

Id. § 8282(b).[7] Utilities subject to this section of the WMBE (such as Pacific Bell[8]) "shall presume that minority includes Black Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans." *Id.*

Section 8283(b) of the WMBE requires that the annual plans submitted by affected utilities include "short- and long-term goals and timetables, but not quotas, and . . . methods for encouraging both prime contractors and grantees to engage women, minority, and disabled veteran business enterprises in subcontracts[.]" The CPUC is directed to "establish guidelines" for all affected utilities to utilize "in establishing programs pursuant to" the WMBE. *Id.* § 8283(c).[9]

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[6] As drafted in 1987, the WMBE made reference only to "women" and "minority" business enterprises. In 1990, the California Legislature amended the WMBE to include "disabled veteran" business enterprises.

[7] A "women business enterprise" is defined similarly. *See id.* § 8282(a).

[8] It is undisputed that Pacific Bell is a "telephone corporation with gross annual revenues exceeding twenty-five million dollars." *Id.* § 8283(a).

[9] The CPUC also is directed to "adopt criteria for verifying and determining the eligibility of women, minority, and disabled veteran business enterprises for procurement contracts." *Id.* § 8284(a).

Pursuant to § 8283(c), the CPUC promulgated and implemented General Order 156 ("General Order"), which includes rules governing the development of programs to increase the participation of women, minority, and disabled veteran business enterprises in accordance with the WMBE. Section 8 of the General Order requires affected utilities to set annually "substantial and verifiable short-term (one year), mid-term (three years), and long-term (five-years) goals for the utilization of WMBEs." "Substantial goals" are "goals which are realistic and clearly demonstrate a utility's commitment to increase WMDVBEs' share of the utility's purchases and contracts."

Section 8.2 of the General Order provides that "[e]ach utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases from outside vendors of not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises." The "specification of initial long-term goals" in the General Order does "not prevent the utilities from seeking to reach parity with public agencies, which the Legislature found in Public Utilities Code Section 8281(b)(1)(B) are awarding 30% or more of their contracts to WMBEs." The General Order defines a "goal" as "a target which when achieved, indicates progress in a preferred direction. A goal is neither a requirement nor a quota."

Pacific Bell, which is subject to the WMBE and the General Order, has maintained its own women and minorities business enterprises program (in some form or another) since 1982. In accordance with the provisions of the WMBE and the General Order, Pacific Bell has submitted to the

CPUC annual reports, which detail Pacific Bell's WMBE "goals" and "performance" for each year.[10]

In his complaint, plaintiff alleged that Pacific Bell and the CPUC defendants "conspired . . . to deprive plaintiff of the equal privileges and immunities guaranteed under the 14th Amendment" by implementing the WMBE and the General Order "in a manner which substantially deprived plaintiff from continuing his long term business relationship with defendant PACIFIC BELL and resulting in a substantial loss of income arising out of the furtherance of said conspiracy." (Compl. ¶ 20.) Plaintiff sought two forms of relief from the CPUC defendants: (1) declaratory relief, in the form of a declaration that (a) the WMBE and (b) the General Order are unconstitutional, both on their face and as applied, and (2) injunctive relief in the form of a permanent injunction forbidding all defendants "from implementing the WMBE law, including General Order 156, in a manner which constitutes any race or sex discrimination against plaintiff and other white males similarly situated." (*Id.* ¶ 28.)

C.

Plaintiff settled all of his claims against Pacific Bell. On November 25, 1992, the Court entered an order dismissing plaintiff's claims against Pacific Bell and placing the record of the settlement conference under seal.[11] Plaintiff repre-

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[10] For example, Pacific Bell reported to the CPUC that its 1990 "goal" for minority business enterprises was 9.5 percent of its purchases from outside vendors, but its actual "performance" for that year was 9.1 percent.

[11] The settlement agreement itself is subject to a protective order. Apparently, the CPUC defendants have yet to see a copy of that agreement. On December 17, 1992, at a status conference before the Court, plaintiff's counsel represented that he would provide a copy of the agreement to the CPUC provided that the CPUC agreed to receive the

sents that 50 percent of the monetary consideration he received under the settlement compensated him for economic damages (i.e., his lost business with Pacific Bell), while the remaining 50 percent compensated him for noneconomic damages.

As a result of plaintiff's settlement with Pacific Bell, plaintiff's only remaining claims are against the CPUC defendants. Those claims, as noted above, are for declaratory and injunctive relief.

II.

A.

Plaintiff's constitutional argument is straightforward: he contends that neither the WMBE nor the General Order can withstand Equal Protection Clause analysis in light of the Supreme Court's decision in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). In *Croson*, the Court held that a state or local governmental actor's use of racial classifications (including purportedly benign classifications) must be subjected to strict scrutiny. To survive strict scrutiny, any such classification must (1) serve a compelling governmental interest, and (2) be narrowly tailored to achieve that compelling interest. *Id.* at 493-94 (plurality opinion of O'Connor, J.); *id.* at 520 (Scalia, J., concurring in the judgment).

Although the CPUC defendants defend the WMBE and the General Order on the merits, they also raise two threshold arguments as to why this Court should avoid reaching the question whether the WMBE and the General Order are constitutional. First, the CPUC defendants argue that this Court should abstain from exercising jurisdiction under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Second, the

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agreement under the protective order. To date, the CPUC has not requested a copy of the settlement agreement from plaintiff's counsel.

CPUC defendants argue that because plaintiff has settled his claims against Pacific Bell, he no longer has standing to challenge the WMBE and the General Order. The first of these arguments plainly is without merit.[12] The standing argument, however, carries the day for the CPUC defendants.

B.

The CPUC defendants contend that plaintiff lacks standing to maintain this action. The Supreme Court has had a good deal to say in recent years on the necessary standing requirements:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an injury in fact—an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or

[12] The Supreme Court has said that *Burford* abstention is warranted only

> (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Pub. Serv., Inc., v. Council of New Orleans, 491 U.S. 350, 361 (1989) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). This case does not involve "difficult questions of state law": the state law at issue here (the WMBE and the rules promulgated thereunder in the General Order) is clear and definite. Nor can it be said that "the exercise of federal review" is likely to "disrupt" the state's "efforts to establish a coherent policy." Plaintiff's case does not involve "a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors[.]" *Id.* at 362.

> imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.
>
> The party invoking federal jurisdiction bears the burden of establishing these elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Luian v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992) (emphasis added) (citations, footnote, internal quotation marks, and internal alterations omitted). Plaintiff fails to satisfy the injury requirement.

This Court does not write upon a clean slate with respect to the standing issue in the context of an Equal Protection Clause challenge to a plan like the WMBE. In two recent cases, the Ninth Circuit has outlined the requirements for a plaintiff, such as the plaintiff in this case, to satisfy the injury prong of the Article III standing test.

The first case, *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 875 (1992), concerned a challenge by a contractor ("Coral Construction") to King County's minority and women business enterprises program. That program was similar to the

one at issue here,[13] and Coral Construction alleged that (1) it had lost business because of the minority business enterprise ("MBE") part of the program, and (2) it stood to lose business because of the women business enterprise ("WBE") part of the program. With respect to the first allegation (MBE), Coral Construction sought damages as well as declaratory and injunctive relief. With respect to the second allegation (WBE), however, Coral Construction sought only declaratory and injunctive relief. This was because Coral Construction could allege that it actually lost a contract only as a result of the MBE program. Coral Construction did not allege that it actually had lost a contract because of the WBE program; rather, it alleged that it stood to lose future contracts because of the preferences given to WBEs.

The Ninth Circuit's analysis of Coral Construction's first challenge, to the MBE program, is not relevant to the standing issue here. The Ninth Circuit's discussion of Coral Construction's challenge to the WBE program is quite relevant because the court (on its own initiative) conducted a searching inquiry into whether Coral Construction had standing to maintain its claims for declaratory and injunctive relief.

After repeating the familiar three-part standing test, the Ninth Circuit turned to the injury component of that test:

> Where only injunctive or declaratory relief is sought, a plaintiff must show a very significant possibility of future harm in order to have standing to bring suit. The complainant must allege an injury to himself that is distinct and palpable, as opposed to merely abstract, and the alleged harm

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[13] Although there are differences between the King County program and the WMBE at issue here, those differences are not relevant to the standing inquiry.

> must be actual or imminent, not conjunctural or hypothetical. Moreover, a federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.

Id. at 929 (emphasis added) (citations, internal quotation marks, and internal alteration omitted). The Ninth Circuit then took note of a recent Eleventh Circuit decision, which imposed significant limitations on a plaintiff's ability to claim an "injury" sufficient for standing purposes. *Cone Corp. v. Florida Dep't of Transp.*, 921 F.2d 1190 (11th Cir.), *cert. denied*, 111 S. Ct. 2238 (1991). The Ninth Circuit summarized *Cone Corp.* as follows:

> [T]he Eleventh Circuit considered Cone Corporation's challenge to an MBE program administered by the Florida Department of Transportation. The plaintiffs alleged that they had lost work as a result of the MBE program. However, the Eleventh Circuit observed that the plaintiffs alleged no facts to support this allegation; that is, they did not point to any specific contract they lost because the Secretary discriminated against them on account of their race. Likewise, the plaintiffs' allegations of future injury suffered the same infirmity; the plaintiffs merely concluded that, because of the Secretary's DBE requirements, they will be injured in their business or property. The [Eleventh Circuit] concluded that these bald conclusions were insufficient to give rise to standing, and that the court would decline to imagine an injury sufficient to give the plaintiffs standing where they have demonstrated none.

Coral Constr., 941 F.2d at 929 (emphasis added) (citations to *Cone Corp.*, internal quotation marks, and internal alterations omitted).

The Ninth Circuit observed that Coral Construction's complaint, "[a]t first blush," might appear to suffer "the

same standing infirmities" the Eleventh Circuit identified in Cone Corporation's complaint. *Id.* Coral Construction was unable to point to a single "contract lost to a woman-owned business." *Id.* Upon further analysis, however, the Ninth Circuit determined that Coral Construction's complaint's "injury" allegations were sufficient to survive the *Cone Corp.* test. Specifically, Coral Construction's complaint included the allegation that the company intended "to bid public contracts to be let by the defendant in the future." *Id.* (emphasis added) (internal quotation marks omitted). The Ninth Circuit also found that this allegation was supported by factual allegations in the complaint: "Coral Construction has a branch office in King County. Coral Construction specializes in guardrail installation, highway signing, and related work, all of which is virtually the exclusive domain of public agencies. It is highly probable that Coral Construction will again bid on work let by King County." *Id.* at 929-30 (emphasis added).

The second Ninth Circuit case that is relevant is *Associated General Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991) ("*AGCC*"), *cert. denied*, 112 S. Ct. 1670 (1992). The *AGCC* case also concerned an equitable challenge to a WMBE program, the City and County of San Francisco's Minority/Women/Local Business Utilization Ordinance. Once again, the Ninth Circuit confronted the threshold question whether the plaintiff, an organization of construction contractors ("AGCC") had standing to pursue its case. Rejecting the arguments of an intervening party that AGCC had not alleged sufficiently a distinct and palpable injury, the Ninth Circuit found that

> the record indicates that AGCC members have firm intentions to bid for San Francisco city contracts, and that the application of the ordinance to the city bids is compulsory in nature. *See* [*Coral Constr.*], 941 F.2d

> [at 929-30]. The mere fact that AGCC members cannot play on an even field against MBEs subjects them to a legally cognizable injury: "[a]s a result of the objectively unequal bidding process under the preference method of awarding contracts, an injury results not only when [a non-MBE] actually loses a bid, but every time the company simply places a bid." Id. at 930.

Id. at 1407 (emphasis added) (third and fourth alterations in original). Thus, the Ninth Circuit's analyses of the injury requirement in *AGCC* and *Coral Construction* were virtually identical. In each case, the plaintiff, which had not alleged the actual loss of a contract (i.e., had not claimed damages), satisfied the injury requirement because it had alleged, and the record in the case supported its allegation, that it intended to bid on a contract in the future.

The same cannot be said of plaintiff in this case. Plaintiff did allege that he lost business as a result of the WMBE and the General Order: specifically, his lost account with Pacific Bell. That allegation was at the bottom of plaintiff's claim for damages against Pacific Bell. Plaintiff did not allege, however, that he might lose any future business because of either the WMBE or the General Order. Indeed, plaintiff did not allege, and there is nothing in the record to indicate, that plaintiff ever has done (or ever intends to bid for) any work for a utility, other than Pacific Bell, that is subject to the WMBE and the General Order.

If plaintiff had not settled his case against Pacific Bell, he might have a stronger case for standing with respect to his claims for declaratory and injunctive relief. Plaintiff might have been able to argue (although it is by no means likely that he would have succeeded) that the WMBE and the General Order prevented him from obtaining future business with Pacific Bell. Plaintiff's settlement, however, extinguished all of his claims with respect to Pacific Bell. There

is nothing wrong, of course, with plaintiff's decision to settle those claims; plaintiffs settle legitimate (and even potentially meritorious) claims involving weighty constitutional issues on a daily basis. Presumably, plaintiff weighed his prospects for success on his claims for compensatory, general, and punitive[14] damages against Pacific Bell's offer to compromise the case and decided to take the proverbial "bird in the hand."

The problem for plaintiff is that when he settled all of his claims against Pacific Bell, he released the only "hook" on which he could attempt to hang the remaining defendants. Plaintiff tries to escape this logic by asserting that his settlement with Pacific Bell compensated him only for his past economic loss. Thus, plaintiff argues that he

> has settled his claim against PACIFIC BELL for money damages, both non-economic (50%) and economic (50%) damages. As to the latter he views his recovery as compensation for past money damages only. However, [plaintiff's] exclusion from further participation in this process represents an ongoing injury which subjects him to the likelihood of imminent future harm.

(Pl.'s Mem. P. & A., at 12:1-6 (emphasis added).) How plaintiff "views" his settlement is, of course, irrelevant to the issue at hand. When plaintiff settled all of his claims against Pacific Bell, he essentially called things even with a former client. Plaintiff does not claim that as a result of the settlement, he and Pacific Bell might do business in the future.

For its part, Pacific Bell already has entered into "improved business relationships" with architectural firms in the Bay Area and plaintiff is not one of those firms. Plaintiff has

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[14] Plaintiff sought punitive damages in the amount of ten million dollars from Pacific Bell. (Compl. ¶ 30.)

neither alleged nor presented the Court with a shred of evidence that Pacific Bell would not have attempted to narrow the number of architectural firms it used in the absence of the WMBE and the General Order; nor has plaintiff presented any evidence that Pacific Bell would reevaluate its decision not to retain plaintiff for future business were the WMBE nullified.[15] Plaintiff's only legal complaint with the process Pacific Bell used to determine which firms it would continue to employ was that it should not have considered WMBE status as part of the equation. Plaintiff's settlement with Pacific Bell effectively extinguished that objection, and with it plaintiff's charge that the WMBE and the General Order interfered with his business opportunities in a constitutionally intolerable manner.

Finally, plaintiff's statement, repeated throughout his complaint, that he seeks declaratory and injunctive relief on behalf of himself and all other "similarly situated" white males does nothing to improve plaintiff's standing. (See Compl. ¶¶ 5, 26, 28, 33.) This is not a class action; hence, plaintiff has no standing to pursue this matter on behalf of all other "similarly situated" white males whose future business might be affected adversely by either the WMBE or the General Order.

III

Under the relevant Ninth Circuit authorities, *Coral Construction* and *AGCC*, plaintiff is unable to satisfy the injury requirement for Article III standing. Accordingly,

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[15] Thus, plaintiff's statements that he "earnestly desire[s] to reinstate [his] long term business relationship with Pacific Bell" and that he "stand[s] ready, willing and able to provide" services to Pacific Bell in the future are irrelevant. (Bras Decl. ¶ 12.)

IT IS HEREBY ORDERED that:

1. The CPUC defendants' motion for summary judgment is GRANTED.

2. Plaintiff's motion for summary judgment is DENIED.

3. This action is dismissed with prejudice.

Dated: March 17, 1993.

/s/ WILLIAM H. ORRICK
William H. Orrick
United States District Judge

FILED
AUG 15 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. JACK BRAS, individually and doing business as J. Jack Bras & Associates,
Plaintiff-Appellant,
v.
CALIFORNIA PUBLIC UTILITIES COMMISSION,
Defendant-Appellee.

No. 93-15764
D.C. No. CV-92-00304-WHO
ORDER DENYING REHEARING

Before: Wallace, Chief Judge, Pregerson and Beezer, Circuit Judges.

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Pregerson would grant the petition for rehearing and accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

ORIGINAL FILED
OCT 19 1995
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RECEIVED
OCT 18 1995
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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Attorneys for Defendant
PACIFIC BELL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

J. JACK BRAS, individually and doing business as J. JACK BRAS & ASSOCIATES,

Plaintiff,

vs.

PACIFIC BELL, a Corporation, CALIFORNIA PUBLIC UTILITIES COMMISSION, PHILIP BREMOND in his representative capacity as MWDVBE Program Manager for the California Public Utilities Commission, NEAL SHULMAN in his representative capacity as Executive Director of the California Public Utilities Commission,

Defendants.

CASE NO.
C 92 0304 WHO

STIPULATION AND WAIVER BY PACIFIC BELL REGARDING CONFIDENTIALITY OF EXHIBITS

RECEIVED
OCT 31 1995
LEGAL DIVISION

Pursuant to protective order in the underlying action, Pacific Bell designated the attached document as "Restricted Confidential." That document is entitled "Supplier Pre-Qualification and Selection Weighting Criteria" and was, along with its attachments, identified as Exhibit 13 to the deposition of Jack Behserasht, taken in the above action.

Pacific Bell hereby agrees to and does waive the confidential nature of the attached exhibit; Pacific Bell retracts its designation of the exhibit as "Restricted Confidential."

DATED: October 18, 1995

PACIFIC BELL LEGAL DEPARTMENT

By: /s/ Eric V. Berg
Eric V. Berg
Attorney for Defendant
PACIFIC BELL

IT IS SO ORDERED

WILLIAM H. ORRICK
U.S. DISTRICT JUDGE

Strip & Waiver of PB Re: Confidentiality of Exhibits
Case No. C 92 0304 WHO
0121512.01

Exhibit 13

Supplier Pre-Qualification and Weighting Criteria

Bay Area Architecture

Attributes	Selection Weighting Criteria
Number of Licensed Architects in Firm	5
Number of Years in Business	5
Financial Data Submitted	—
90 Expenditures and Under Contract	5
Central Office Design Experience	25
Administrative Space Design Exp.	10
Present C.A.D. Capability	5
Will Participate in New Technologies	—
Able to Serve Entire Bay Area	—
M/WBE Status	10
Will Share Internal Costs/Processes	—
Quality of Past Performance	25
Size of Organization	5
Total	95

BTS 4/16/91
criteria

RESTRICTED CONFIDENTIAL

PROOF OF SERVICE BY MAIL

Re: *J. Jack Bras v. Pacific Bell, et al.*
United States District Court, Northern District Court
Action No. Civil No. C 92 0304 WHO

I, Dolores M. Frye, declare that:

I am over the age of eighteen years, not a party to the within action, and employed in the City and County of San Francisco, California. My business address is Pacific Bell Legal Department, 140 New Montgomery Street, Room 1015, San Francisco, California 94105.

I am readily familiar with our practice for collection and processing of correspondence and documents for mailing. Under that practice, in the ordinary course of business, correspondence and documents are deposited, postage fully prepaid, with the United States Postal Service on the same day they are collected and processed.

On the date specified below, I served the foregoing **STIPULATION AND WAIVER (SIGNED INTO ORDER) BY PACIFIC BELL REGARDING CONFIDENTIALITY OF EXHIBITS** on the person(s) listed below by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, in accordance with our ordinary practices, addressed as follows:

Pamela A. Lewis, Esq.
Morgan, Miller & Blair
1676 North California Blvd., Ste. 200
Walnut Creek, CA 94596

Arocles Aguilar, Esq.
California Public Utilities Commission
505 Van Ness Avenue, Room 5124
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: October 30, 1995

Dolores M. Frye

Stip & Waiver of PB Re:
Confidentiality of Exhibits
Case No. C 92 0304 WHO
0122397.01

LAW OFFICES OF JOHN H. GARVIN
7901 Stoneridge Drive, Suite 501
Pleasanton, CA 94588

Telephone: (415) 847-3033

Attorney for Plaintiff
J. JACK BRAS, individually
and doing business as
J. JACK BRAS & ASSOCIATES

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

J. JACK BRAS, individually and doing business as J. JACK BRAS & ASSOCIATES,
Plaintiff,

v.

PACIFIC BELL, a Corporation, CALIFORNIA PUBLIC UTILITIES COMMISSION, PHILIP BREMOND in his representative capacity as MWDVBE Program Manager for the California Public Utilities Commission, NEAL SHULMAN in his representative capacity as Executive Director of the California Public Utilities Commission,
Defendants.

CIVIL NO. C 92 0304

COMPLAINT FOR MONEY DAMAGES DECLARATORY RELIEF, INJUNCTIVE RELIEF AND ATTORNEY'S FEES UNDER THE UNITED STATES CONSTITUTION; CALIFORNIA CONSTITUTION; 42 U.S.C. SECTIONS 1981, 1983 AND 1985

Jury Trial Demanded

I

PRELIMINARY STATEMENT

Plaintiff J. JACK BRAS, individually and doing business as J. JACK BRAS & ASSOCIATES (hereinafter "BRAS") seeks to have this court declare invalid and enjoin the enforcement of California Public Utilities Code Sections 8281 et seq. commonly known as the "Women, Minority Business Enterprise Program" for public utilities (hereinafter "WMBE"), as well as General Order 156 promulgated and enforced by the California Public Utilities Commission (hereinafter "CPUC") to implement the WMBE program. This body of law is challenged on the grounds that it is in conflict with the provisions contained in the 14th Amendment of the Constitution of the United States as well as Article 1, Section 7 and 8 of the Constitution of the State of California. Plaintiff claims that as a white, male architect he has been the subject of invidious, unlawful discrimination on account of his race and sex because of the implementation and enforcement of the aforesaid WMBE program by defendants.

II

JURISDICTION

1. Jurisdiction of this court is invoked pursuant to 28 U.S.C. Sections 1343(3) and (4). This is an action authorized by 42 U.S.C. Sections 1983 and 1985. The rights, privileges and immunities sought to be secured in this action are rights, privileges and immunities guaranteed by the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States and by 42 U.S.C. Section 1981.

2. This action is also brought pursuant to the Constitution of the State of California Article 1, Section 7 and Section 8 and any legislation effecting such mandates.

3. This action is also brought pursuant to California Code of Civil Procedure Section 1021.5 and 42 U.S.C. Section 1988 for attorneys' fees.

4. The unlawful discriminatory practices alleged below have been and are now continuing to be committed within the Northern Complaint District of California.

5. This action also seeks declaratory judgment of this court pursuant to F.R.C.P. 57, to declare California's WMBE Program unconstitutional under the 14th Amendment to the United States Constitution and under Article 1, Section 7 and 8 of the California Constitution as promulgated and implemented to deprive plaintiff of said constitutional rights. The declaratory judgment, as well as the injunctive relief sought herein, are necessary to protect the rights of plaintiff but also the rights of existing white, male vendors or contractors in their business dealings with public utilities such as defendant PACIFIC BELL.

III

PARTIES

6. At all times herein material plaintiff BRAS has been and continues to be a licensed California architect presently residing in the City of Pleasanton, Alameda County, State of California and doing business as J. Jack Bras & Associates, a sole proprietorship engaged in the rendition of architectural services in the greater San Francisco Bay Area.

7. At all times herein material defendant PACIFIC BELL has been and continues to be a corporation authorized to do and doing business in the State of California with its principal offices located in the City and County of San Francisco and, at all times herein material provides telephone and telephone related services and products as a regulated public utility under the CPUC and laws applicable thereto.

8. At all times herein material defendants NEAL SHULMAN and PHILIP BREMOND, each sued herein in their representative capacity, are respectively the executive director of the CPUC and WMBE Program Manager for the CPUC charged with the implementation and enforcement of the WMBE law as set forth in California Public Utilities Code Sections 8281 et seq. as well as CPUC General Order 156.

FIRST CAUSE OF ACTION
(VIOLATION OF 42 U.S.C.S. Section 1981 and 14th Amendment to U.S. Constitution)

Plaintiff alleges as follows:

9. Effective January 1, 1987 California enacted, as set forth in its Public Utilities Code Sections 8281 et seq., a body of law entitled "Women and Minority Business Enterprises (later amended to include disabled veterans) which found, inter alia, that women, and minority business enterprises (WMBEs) have traditionally received less than a proportionate share of regulated public utility procurement contracts (Section 8281(b)(1)(C)) and provided that the California Public Utilities Commission (CPUC) shall require each public utility under its jurisdiction with gross annual revenues exceeding twenty-five million dollars ($25,000,000) to establish short and long term goals and time tables to hire WMBEs in the procurement of goods and services purchased by such public utilities and, further, to submit annually a detailed and verifiable plan for increasing WMBEs procurement in all categories. (Section 8281(a) and (b).) Annual reports from such public utilities to the CPUC concerning the implementation of such programs were required and the CPUC was itself to submit an annual report to the legislature as to the progress of activities undertaken by each such public utility. (Section 8283(b) and (e).) Although "quotas" were not to be implemented (Section 8283(b)), the legislature recognized "goals" of

30% or more being utilized by public agencies in their award of contracts to such business enterprises as a benchmark to be achieved (Section 8281(b)(1)(B)). Noteworthy in this body of law is the absence of any finding that discriminatory business practices against women and minority contractors existed in the procurement of goods and services by the public utilities from the business community at large.

10. Pursuant to California Public Utilities Code Section 8283(c), the CPUC promulgated and implemented General Order 156 effective May 30, 1988 which, inter alia, directed such public utilities to set short (one year) mid term (three years) and long term (five years) "goals" for using WMBE contractors for each major product and service category, establishing an initial minimum long term goal for each major category of product and services of "not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises." (Emphasis added.) (Section 6.2, General Order 156.) The term "goal" is defined to mean "a target which when achieved, indicates progress in a preferred direction. A goal is neither a requirement nor a quota." (Section 1.3.12, General Order 156.) Additionally, CPUC's General Order 156 required each utility to train its WMBE personnel in a manner such that their performance evaluation would depend upon his/her progress in meeting the aforesaid "goals." (Section 1.1.2, General Order 156.) Further, General Order 156 required each such utility to promulgate and implement an external outreach program designed to disseminate to prospective WMBE contractors the benefits of this program and to work with such groups in order to qualify them for participation in the WMBE program. (Section 4.2, General Order 156.)

11. Further, General Order 156 directed the affected public utilities to establish 39 categories each consisting of a major product and service group as to which its goals were required to be expressed as a percentage of total dollars awarded by a utility to outside vendors in that category

(Section 6.7, General Order 156), such goals to be "substantial and verifiable." (Section 6, General Order 156.) "Substantial goals" was defined to "mean goals which are realistic and clearly demonstrate a utilities commitment to increase WMBEs' share of the utilities purchases and contracts." (Footnote 6, General Order 156.) One of the factors that each effected utility was required to consider in setting their goals was any "other appropriate factors which would increase the WMBEs' share of utility business." (Section 6.1.4., General Order 156.) The CPUC admonished the affected utilities that the "specification of initial long term goals in this section shall not prevent the utilities from seeking to reach parity with public agencies, which the legislature found in Public Utilities Code Section 8281(b)(1)(B) are awarding 30% or more of their contracts to WMBEs'." (Section 6.2, General Order 156.)

12. Defendant Pacific Bell, as an affected public utility forthwith implemented General Order 156 and, as required, submitted its annual report to the CPUC setting forth Pacific Bell's activities and results for the period January 1-December 31, 1990. Said defendant reported to the CPUC that for the year 1990 it had exceeded its 1990 goal of 14.5% (9.9% MBE's and 5% WBE's) with an actual performance of 16.3% (MBE's 9.1% and WBE's 7.2%) (page 24 of defendant PACIFIC BELL's M/WBE annual report). However, in the broad category of "architect/interior design" the 1990 MBE goal was 35.5% and WBE goal was 7.5% with actual performance achieved in 1990 indicating 31.8% MBE and 23.7% WBE (page 25 (a), PACIFIC BELL's M/WBE annual report to the CPUC). In total, for the year 1990 in the architect/interior design group PACIFIC BELL awarded, in dollar terms, 55.5% of its contracts to women/minority business enterprises. For the year 1991, defendant PACIFIC BELL in this category of architect/interior design, set its goal for both MBE's and WBE's for a total of 55.5%, for 1993 55.5% and for 1995

55.5% (page 34(a) of defendant PACIFIC BELL's M/WBE annual report).

13. Since 1969 and continuing through 1990 plaintiff BRAS has continuously provided architectural services to defendant PACIFIC BELL. On information and belief plaintiff BRAS alleges that his architectural services have always been competitive and at least satisfactory to defendant PACIFIC BELL.

14. Plaintiff BRAS is himself white and a male and, being a small architectural firm, employs one other licensed architect who is also white and male. In short, plaintiff BRAS has never claimed to be an actual or prospective WMBE entity.

15. Commencing sometime in 1991 plaintiff BRAS sustained a severe diminution of his business with defendant PACIFIC BELL. On information and belief plaintiff BRAS alleges that his loss of a substantial portion of his architectural services to PACIFIC BELL was because PACIFIC BELL deliberately and intentionally ceased doing all but a mere trickle of business with plaintiff BRAS in order to meet the mandate of the WMBE program promulgated by the legislature in Public Utilities Code Section 8281 et seq. and CPUC's General Order 156. In substance plaintiff Bras alleges that defendant PACIFIC BELL, under color of law, has discriminated against plaintiff BRAS on the grounds of his race and gender and in violation of his rights under the 14th Amendment to the United States Constitution.

16. As a proximate result of said discrimination by defendant PACIFIC BELL, plaintiff BRAS has suffered compensatory and general damages in an amount to be determined at trial in accordance with proof.

SECOND CAUSE OF ACTION
(42 U.S.C. SECTIONS 1981 and 1983)

17. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-16 inclusive with the same force and effect as if set out here again.

18. The action taken by defendant PACIFIC BELL as set forth above were taken under color of law and are in violation of plaintiff's rights as secured by 42 U.S.C. Sections 1981 and 1983.

THIRD CAUSE OF ACTION
(42 U.S.C. SECTION 1985)

19. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-16 inclusive with the same force and effect as if set out herein again.

20. On information and belief plaintiff alleges that defendant PACIFIC BELL conspired, in conjunction with defendants NEAL SHULMAN and PHILIP BREMOND, in their representative capacity with the CPUC, to deprive plaintiff of the equal privileges and immunities guaranteed under the 14th Amendment to the United States Constitution by implementing the WMBE law, including General Order 156, in a manner which substantially deprived plaintiff from continuing his long term business relationship with defendant PACIFIC BELL and resulting in a substantial loss of income arising out of the furtherance of said conspiracy.

FOURTH CAUSE OF ACTION
(California Constitution Article 1, Section 7)

21. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-16 inclusive with the same force and effect as if set out herein again.

22. The actions taken by defendant PACIFIC BELL as set forth above unlawfully denied plaintiff the equal protec-

tion of the laws in violation of plaintiff's rights under Article 1, Section 7 of the California State Constitution.

FIFTH CAUSE OF ACTION
(California Constitution, Article 1, Section 8)

23. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-16 inclusive with the same force and effect as if set out herein again.

24. The actions taken by the defendant PACIFIC BELL as set forth above unlawfully deprived plaintiff from pursuing his profession because of his sex and race. By doing so defendant PACIFIC BELL violated plaintiff's rights under Article 1, Section 8 of the California State Constitution.

SIXTH CAUSE OF ACTION
(F.R.C.P. 57-DECLARATORY RELIEF)

25. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-15 inclusive with the same force and effect as if set out herein again.

26. Plaintiff seeks a declaratory judgment on the grounds that the WMBE law as set forth in California Public Utilities Code Section 8281 et seq. as well as CPUC's General Order 156, as promulgated and as applied against plaintiff denies plaintiff, as well as others similarly situated, the equal protection of the law as well as the privileges and immunities guaranteed to plaintiff and others similarly situated under the 14th Amendment to the United States Constitution as well as Article 1, Section 7 and Section 8 of the California Constitution. Plaintiff has no plain, speedy or adequate remedy at law to rectify the unlawful racial and sexual discrimination practice upon him as well as others similarly situated by defendants other than by way of declaratory relief prayed for in this complaint.

SEVENTH CAUSE OF ACTION
(Injunctive Relief)

27. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1-15 inclusive with the same force and effect as if set out here again.

28. Plaintiff respectfully requests the court to issue a preliminary injunction as well as a permanent injunction enjoining all defendants, their agents, servants and employees and any and all persons acting in concert with them from implementing the WMBE law, including General Order 156, in a manner which constitutes any race or sex discrimination against plaintiff and other white males similarly situated. Plaintiff alleges that it has no plain, speedy or adequate remedy at law to rectify a continuation of the unlawful racial and sexual discrimination practiced upon him and others similarly situated by defendants other than by the injunctive relief prayed for in this complaint.

EIGHTH CAUSE OF ACTION
(Punitive Damages)

29. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-16 inclusive with the same force and effect as if set out herein again.

30. On information and belief plaintiff alleges that the actions taken by defendant PACIFIC BELL as set forth above were intentional, deliberate and applied against plaintiff with a reckless or malicious disregard of his constitutional rights as guaranteed to him under the 14th Amendment to the United States Constitution as well as 42 U.S.C.S. Sections 1981, 1983 and 1985 and, by way of example, plaintiff requests that exemplary or punitive damages be assessed defendant PACIFIC BELL in the amount of $10,000,000.

NINTH CAUSE OF ACTION
(Attorney's Fees)

31. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1-28 inclusive with the same force and effect as if set out herein again.

32. Plaintiff has had to incur the services of attorneys in order to protect his constitutional rights under the federal and state constitutions as well as under U.S.C.S. Sections 1981, 1983 and 1985 as described above.

33. Plaintiff is entitled to attorney's fees from defendant PACIFIC BELL for vindicating plaintiff's rights as well as the rights of others similarly situated pursuant to 42 U.S.C. Section 1988 and the California Code of Civil Procedure Section 1021.5. Further, plaintiff would also be entitled to attorney's fees from any party, necessary or otherwise, that opposes in this litigation the relief plaintiff seeks.

WHEREFORE, plaintiff respectfully prays that this court enter judgment in favor of plaintiff on each and every cause of action and grant plaintiff:

1. Money damages, both compensatory and general, from defendant PACIFIC BELL for its violation of plaintiff's constitutional rights as guaranteed by the United States Constitution, the California State Constitution, 42 U.S.C. Sections 1981, 1983 and 1985 in an amount to be determined in accordance with proof at time of trial;

2. Exemplary or punitive damages in the amount of $10,000,000 assessed against defendant PACIFIC BELL by way of example for violation of plaintiff's constitutional rights secured by the United States Constitution, the California State Constitution, 42 U.S.C. Sections 1981, 1983 and 1985;

3. A declaratory judgment that defendants' actions, as well as the WMBE law (California Public Utility Code Section 8281-8286, inclusive) and General Order 156

promulgated by the California Public Utilities Commission violate the rights of plaintiff as secured to him by the United States Constitution, the California State Constitution, 42 U.S.C. Section 1981 and 1983;

4. A preliminary injunction and permanent injunction joining all defendants, their agents, servants, employees and any and all persons acting in concert with them from utilizing or implementing any race or gender goals, guidelines or quotas in its application and enforcement of California Public Utilities Code Sections 8281-8286 inclusive and General Order 156;

5. Attorneys' fees and costs of suit herein from defendant PACIFIC BELL and any necessary party that opposes the relief sought; and,

6. Such other and further relief as to the court may be just.

DATED: January 8, 1992.

LAW OFFICES OF
JOHN H. GARVIN

BY: /s/ JOHN H. GARVIN
JOHN H. GARVIN
Attorney for Plaintiff
J. JACK BRAS, individually
and doing business as
J. JACK BRAS &
ASSOCIATES

VERIFICATION

I am a plaintiff in the above entitled action. I have read the foregoing COMPLAINT FOR MONEY DAMAGES, DECLARATORY RELIEF, INJUNCTIVE RELIEF AND ATTORNEY'S FEES UNDER THE UNITED STATES CONSTITUTION; CALIFORNIA CONSTITUTION; 42 U.S.C. SECTIONS 1981 AND 1983; and know the contents thereof; the same is true of my own knowledge, except as to those matters stated therein upon my information and belief and, as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct, and that this verification is executed on January 8, 1992 at Pleasanton, California.

/s/ J. JACK BRAS

J. JACK BRAS

Article 5

WOMEN AND MINORITY BUSINESS ENTERPRISES

Section

8281. Legislative findings and declarations; state policy; purpose of article.

8282. Definitions.

8283. Electrical, gas and telephone corporations with revenues over $25,000,000; annual submission of plan for increasing women, minority business and disabled veteran business enterprise procurement.

8284. Criteria for determining and verifying eligibility of women, minority business and disabled veteran business enterprises for procurement contracts; outreach programs.

8285. False representation of businesses; penalty.

8286. Contract procurement measures; considerations for businesses.

Article 5 was added by Stats.1986, c. 1259, § 1.

United States Code Annotated

Contracts, equal opportunity, see 12 U.S.C.A. § 4520.

§ 8281. Legislative findings and declarations; state policy; purpose of article

(a) The Legislature hereby finds and declares that the essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, reasonable and just prices, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of that competition is basic to the economic well-being of this state and that well-being cannot be realized unless the actual and potential capacity of women, minority, and disabled veteran business enterprises is encouraged and developed. Therefore, it is the declared policy of the state to aid the interests of women, minority, and disabled veteran business enterprises in order to preserve reasonable and just prices and a free competitive

enterprise, to ensure that a fair proportion of the total purchases and contracts or subcontracts for commodities, supplies, technology, property, and services for regulated utilities are awarded to women, minority, and disabled veteran business enterprises, and to maintain and strengthen the overall economy of the state.

(b)(1) The Legislature finds all of the following:

(A) The opportunity for full participation in our free enterprise system by women, minority, and disabled veteran business enterprises is essential if this state is to attain social and economic equality for those businesses and improve the functioning of the state economy.

(B) Public agencies which have established short- and long-range women, minority, and disabled veteran business enterprise goals are awarding 30 percent or more of their contracts to these business enterprises.

(C) Women, minority, and disabled veteran business enterprises have traditionally received less than a proportionate share of regulated public utility procurement contracts.

(D) It is in the state's interest to expeditiously improve the economically disadvantaged position of women, minority, and disabled veteran business enterprises.

(E) The position of these businesses can be improved by providing long-range substantial goals for procurement by regulated public utilities of technology, equipment, supplies, services, materials, and construction work from women, minority, and disabled veteran businesses.

(F) That procurement also benefits the public utilities and consumers of the state by encouraging the expansion of the number of suppliers for procurements, thereby encouraging competition among the suppliers and promoting economic efficiency in the process.

(2) It is the purpose of this article to do all of the following:

(A) Encourage greater economic opportunity for women, minority, and disabled veteran business enterprises.

(B) Promote competition among regulated public utility suppliers in order to enhance economic efficiency in the procurement of electrical, gas, and telephone corporation contracts and contracts of their commission-regulated subsidiaries and affiliates.

(C) Clarify and expand the program for the procurement by regulated public utilities of technology, equipment, supplies, services, materials, and construction work from women, minority, and disabled veteran business enterprises.

(Added by Stats.1986, c. 1259, § 1. Amended by Stats.1990, c. 516 (S.B.2398), § 4.)

§ 8282. Definitions

For the purposes of this article, the following definitions apply:

(a) "Women business enterprise" means a business enterprise that is at least 51 percent owned by a woman or women; or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and whose management and daily business operations are controlled by one or more of those individuals.

(b) "Minority business enterprise" means a business enterprise that is at least 51 percent owned by a minority group or groups; or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more minority groups, and whose management and daily business operations are controlled by one or more of those individuals. The contracting utility shall presume that minority includes Black Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans.

(c) "Disabled veteran business enterprise" has the same meaning as defined in subdivision (g) of Section 999 of the Military and Veterans Code.

(d) "Control" means exercising the power to make policy decisions.

(e) "Operate" means being actively involved in the day-to-day management and not merely officers or directors.

(Added by Stats.1986, c. 1259 § 1. Amended by Stats.1990, c. 516 (S.B.2398), § 5.)

§ 8283. Electrical, gas and telephone corporations with revenues over $25,000,000; annual submission of plan for increasing women, minority business and disabled veteran business enterprise procurement.

(a) The commission shall require each electrical, gas, and telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000) and their commission-regulated subsidiaries and affiliates, to submit annually, a detailed and verifiable plan for increasing women, minority, and disabled veteran business enterprise procurement in all categories.

(b) These annual plans shall include short- and long-term goals and timetables, but not quotas, and shall include methods for encouraging both prime contractors and grantees to engage women, minority, and disabled veteran business enterprises in subcontracts in all categories which provide subcontracting opportunities.

(c) The commission shall establish guidelines for all electrical, gas, and telephone corporations with gross annual revenues exceeding twenty-five million dollars ($25,000,000) and their commission-regulated subsidiaries and affiliates, to be utilized in establishing programs pursuant to this article.

(d) Every electrical, gas, and telephone corporation with gross annual revenues exceeding twenty-five million dollars

($25,000,000) shall furnish an annual report to the commission regarding the implementation of programs established pursuant to this article in a form that the commission shall require, and at the time that the commission shall annually designate.

(e) The commission shall provide a report to the Legislature on September 1 of each year, on the progress of activities undertaken by each electrical, gas, and telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000) pursuant to this article in the implementation of women, minority, and disabled veterans business enterprise development programs. The commission shall recommend a program for carrying out the policy declared in this article, together with recommendations for legislation that it deems necessary or desirable to further that policy.

(Added by Stats.1986, c. 1259, § 1. Amended by Stats.1989, c. 76, § 1, eff. June 30, 1989; Stats.1990, c. 394 (A.B.2935), § 1; Stats.1990, c. 516 (S.B.2398), §6.)

Historical and Statutory Notes

Section affected by two or more acts at the same session of the legislature, see Government Code § 9605.

Cross References

Reports to legislature or governor, moratorium and exceptions, see Government Code § 7550.5.

§ 8284. Criteria for determining and verifying eligibility of women, minority business and disabled veteran business enterprises for procurement contracts; outreach programs

(a) The commission shall, by rule or order, adopt criteria for verifying and determining the eligibility of women,

minority, and disabled veteran business enterprises for procurement contracts.

(b) The commission shall develop, and require every electrical, gas, and telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000) and their commission-regulated subsidiaries and affiliates to implement, an outreach program to inform and recruit women, minority, and disabled veteran business enterprises to apply for procurement contracts under this article.

(Added by Stats.1986, c. 1259, § 1. Amended by Stats.1990, c. 516 (S.B.2398), § 7.)

§ 8285. False representation of businesses; penalty

Any person or corporation, through its directors, officers, or agents, which falsely represents a business as a women, minority, or disabled veteran business enterprise in the procurement of, or attempt to procure, contracts from an electrical, gas, or telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000), or a commission-regulated subsidiary or affiliate subject to this article, shall be punished by a fine of not more than five thousand dollars ($5,000) or by imprisonment in the county jail for not to exceed one year or in the state prison for not to exceed five years, or by both that fine and imprisonment. In the case of a corporation, the fine or imprisonment, or both, shall be imposed on every director, officer, or agent responsible for the false statements.

(Added by Stats.1986, c. 1259, § 1. Amended by Stats.1990, c. 516 (S.B.2398), § 8.)

Historical and Statutory Notes

The 1990 amendment included business enterprises of disabled veterans; substituted "or a" for "and their" before "commission-regulated"; deleted "of its directors, officers,

or agents responsible for the false statements" after "not to exceed five years"; added the second sentence; and made other nonsubstantive changes.

§ 8286. Contract procurement measures; considerations for businesses

In order to facilitate the participation of women-owned businesses, minority-owned businesses, and small businesses in contract procurement, any corporation subject to this article may consider the following measures to include those businesses in all phases of their contracting:

(a) Timely or progressive payments to those businesses.

(b) An amendment of the performance bond requirements when past performance within a specified area of business justifies that consideration.

(c) The provision of assistance to those businesses by securing contract payments to those businesses with letters of credit, negotiable securities, or other financing arrangements or measures.

(Added by Stats.1990, c. 1195 (A.B.3985). § 2.)

GENERAL ORDER 156

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

RULES GOVERNING THE DEVELOPMENT OF PROGRAMS TO INCREASE PARTICIPATION OF WOMEN, MINORITY AND DISABLED VETERAN BUSINESS ENTERPRISES IN PROCUREMENT OF CONTRACTS FROM UTILITIES AS REQUIRED BY PUBLIC UTILITIES CODE SECTIONS 8281-8286

Adopted April 27, 1988. Effective May 30, 1988.
Decision 88-04-057 in R.87-02-026,
Modified by Decisions 88-09-024, 89-08-041, 90-11-053, 90-12-027 and 92-06-030.

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1. GENERAL

1.1. **Intent**

1.1.1. **Purpose** — These rules implement PU Code Sections 8281-8286 which require the Commission to establish a procedure for gas, electric, and telephone utilities with gross annual revenues exceeding $25,000,000 and their Commission-regulated subsidiaries and affiliates to submit annual detailed and verifiable plans for increasing women, minority, and disabled veteran business enterprises' (WMDVBE) procurement in all categories.

1.1.2. **Revisions of Scope**—These rules may be revised on the basis of experience gained in their application and/or changes in legislation. Utilities and other interested parties may individually or collectively file an application with the Commission for the purpose of amending these rules. Any such application shall clearly set forth the changes proposed and the supporting rationale.

1.1.3. In cases where the application of any of these rules results in undue hardship or unreasonable expense to a utility, the utility may request relief by filing an application in accordance with the Commission's Rules of Practice and Procedure. Where the relief requested is of minor importance or temporary in nature, the utility may apply for such relief through an advice letter filing. Any advice letter filing must, at a minimum, be served on all parties on the service list of this proceeding.

1.2. **Applicability**—These rules are applicable to all gas, electric, and telephone utilities under the Commission's jurisdiction with gross annual revenues exceeding $25,000,000 and their Commission-regulated subsidiaries and affiliates.

1.3. **Definitions**

1.3.1. "Commission" means The California Public Utilities Commission as provided for in Article XII of the California Constitution.

1.3.2. "Women-owned business" means (1) a business enterprise (a) that is at least 51% owned by a woman or women or (b) if a publicly owned business, at least 51% of the stock of which is owned by one or more women; and (2) whose management and daily business operations are controlled by one or more of those individuals.

1.3.3. "Minority-owned business" means (1) a business enterprise (a) that is at least 51% owned by a minority individual or group(s) or (b) if a publicly owned business, at least 51% of the stock of which is owned by one or more minority groups, and (2) whose management and daily business operations are controlled by one or more of those individuals. The contracting utility shall presume that minority includes, but is not limited to, Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other groups, as defined herein.

1.3.4. "WMBE" means a women owned or minority owned business enterprise; under these rules, the women and/or minorities owning such an enterprise must be either U.S. citizens or legal aliens with permanent residence status in the United States.

1.3.5. Black Americans—persons having origins in any black racial groups of Africa.

1.3.6. Hispanic Americans—all persons of Mexican, Puerto Rican, Cuban, South or Central American, Caribbean, and other Spanish culture or origin.

1.3.7. Native Americans—persons having origin in any of the original peoples of North America or the Hawaiian Islands, in particular, American Indians, Eskimos, Aleutes, and Native Hawaiians.

1.3.8. Asian Pacific Americans—persons having origins in Asia or the Indian subcontinent, including, but not limited to, persons from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, Taiwan, India, Pakistan, and Bangladesh.

1.3.9. Other groups—whose members are found to be disadvantaged by the Small Business Administration pursuant to Section 8(d) of Small Business Act as amended (15 U.S.C. 637(d)), or the Secretary of Commerce pursuant to Section 5 of Executive Order 11625.

1.3.10. Disabled Veteran—a veteran of the military, naval or air service of the United States with a service-connected disability who is a resident of the State of California.

1.3.11. "Control" means exercising the power to make policy decisions.

1.3.12. "Operate" means being actively involved in the day-to-day management and not merely acting as officers or directors.

1.3.13. "Goal" means a target which when achieved, indicates progress in a preferred direction. A goal is neither a requirement nor a quota.

1.3.14. "Excluded category" means a category of products or services which may be removed from the dollar base used to establish goals, pursuant to Section 8.5 of this general order, because of the established unavailability of WMDVBEs capable of supplying those products or services.

1.3.15. "Short-term goal" means a goal applicable to a period of (1) one year.

1.3.16. "Mid-term goal" means a goal applicable to a period of (3) three years.

1.3.17. "Long-term goal" means a goal applicable to a period of (5) five years.

1.3.18. "Utility" means all electric, gas, and telephone corporations with gross annual revenues exceeding twenty-five million dollars ($25,000,000) and their Commission-regulated subsidiaries and affiliates.

1.3.19. "Clearinghouse" means a Commission-supervised program that shall conduct WMBE verifications and maintain a database of WMDVBEs for the use of utilities and the Commission.

1.3.20. "Subcontract" means any agreement or arrangement between a contractor and any party or person (in which the parties do not stand in the relationship of an employer and an employee):

1.3.20.1. For the furnishing of supplies or services for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or

1.3.20.2. Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.

2. VERIFICATION

The following rules and guidelines shall be used to verify the eligibility of women and minority business enterprises (WMBEs) for participation in utility WMDVBE procurement programs.

2.1. The clearinghouse described in Section 3 of this General Order shall supply a verification form to applicants. An applicant may complete the verification forms and return them to the clearinghouse for processing and inclusion in the database.

2.2. In assessing the suitability of a WMDVBE to bid for procurement contracts, a utility may require additional information or the completion of additional forms to comply with specific requirements created by the unique character of its business, such as insurance requirements, product and service codes, bonding limits, and so on. A utility may not, however, require such additional information in order to verify that a business is in fact a WMDVBE.

2.3. WMBEs shall be required to submit verification forms at least once every three years.

2.4. Completion of the verification application only initiates a verification of the business's WMBE status. Filing of an application does not guarantee verification.

2.5. The fact that a verified WMDVBE is included in the clearinghouse database shall neither be construed as an endorsement of its ability to perform nor shall such inclusion guarantee it business with the utilities.

2.6. WMBE verification forms shall be available for inspection by the Commission.

2.7. Falsification of information on the verification form is subject to the penalties provided by Public Utilities Code Section 8285.

3. CLEARINGHOUSE

The Commission shall maintain a clearinghouse for the sharing of WMDVBE identification and verification information.

3.1. The primary purpose of the clearinghouse shall be to audit and verify the status of WMBEs, and to establish and maintain a database of WMDVBEs that is accessible to the Commission and to participating utilities.

3.2. The clearinghouse auditing and verification program shall preclude the need for an individual utility to audit and verify the status of the WMBEs it does business with.

3.3. The clearinghouse shall distribute renewal verification forms to WMBEs at least once every three years. If the renewal is not completed and returned within a reasonable time, the clearinghouse shall notify the WMBE and utilities that the WMBE will not be listed as a verified WMBE in the shared database until the renewal is completed.

4. DISABLED VETERANS

The following rules and guidelines shall apply to service disabled veteran business enterprises (DVBE). "Disabled veteran" is defined in Section 1.3.10 of this General Order.

4.1. "Disabled veteran business enterprise" means a business concern certified by the administering agency as meeting all of the following requirements.

4.1.1. It is a sole proprietorship at least 51 percent owned by one or more disabled veterans or, in the case of a publicly owned business, at least 51 percent of its stock is owned by one or more disabled veterans; a subsidiary which is wholly owned by a parent corporation, but only if at least 51 percent of the voting stock of the parent corporation is owned by one or more disabled veterans; or a joint venture in which at least 51 percent of the joint venture's management and control and earnings are held by one or more disabled veterans.

4.1.2. The management and control of the daily business operations are by one or more disabled veterans. The disabled veterans who exercise management and control are not required to be the same disabled veterans as the owners of the business concern.

4.1.3. It is a sole proprietorship, corporation, or partnership with its home office located in the United States, which is not a branch or subsidiary of a foreign corporation, foreign firm, or other foreign-based business.

4.2. "Administering Agency" means the California State Office of Small and Minority Business.

4.3. In order to qualify as a DVBE, businesses must meet the criteria in Section 4.1 and must present a current certificate from the California State Office of Small and Minority Business verifying that such criteria has been met.

5. GENERAL ORDER 156 ADVISORY BOARD

The Commission WMDVBE Staff shall consult with a General Order 156 Advisory Board (Board) to seek advice on matters relating to this General Order and to the Public Utilities Code sections applicable to this General Order.

5.1. The Board shall consist of a representative of each of the attending utilities and Black Americans (§ 1.3.5), Hispanic Americans (§ 1.3.6), Native Americans (§ 1.3.7), Asian Pacific Americans (§ 1.3.8), Women, and Disabled Veterans (§ 1.3.10).

5.2. Each non-utility group identified in Section 5.1 shall select its own representative. If a group is unable to select its representative, it may petition the Executive Director to select a representative. Representatives shall serve for two-year terms. Representatives may serve multiple terms if reselected by the group they represent.

5.3. Participation on the Board is voluntary and the utilities are free to attend, or not, and may coordinate attendance or join with other utilities of similar size or interests.

5.4. The Board shall meet no less than every other month.

6. UTILITY IMPLEMENTATION

Each utility's WMDVBE program shall be designed to ensure that a fair proportion of product and services contracts are awarded to WMDVBEs. The following minimum program elements shall be incorporated into each utility's WMDVBE program.

6.1. **Internal Utility Program Development**

Each utility shall maintain an appropriately sized staff to provide overall WMDVBE program direction and guidance and to implement WMDVBE program requirements.

6.1.1. Each utility shall ensure that its employees with procurement responsibilities receive training in the implementation of its WMDVBE program. These employees shall be evaluated on the basis of their progress in meeting the goals of their specific area of procurement. Some of the major components of a training program shall include:

(1) Review of WMDVBE program progress and results, and the development of future strategies, at officer level meetings. These meetings shall also include an exchange of ideas and a pledge of ongoing support for the program;

(2) Meetings or seminars to familiarize employees with WMDVBE program objectives, goals, and operations, and with the special problems confronting WMDVBEs;

(3) Programs to train and encourage employees involved in procurement activities to break apart purchases and contracts as appropriate to accommodate the capabilities of WMDVBEs.

6.2. **External Outreach**

Each utility shall implement an outreach program to inform and recruit WMDVBEs to apply for procurement contracts.

6.2.1. Outreach activities may vary for each utility depending on its size, service territory, and specific lines of business. However, each utility shall at a minimum:

(1) Actively seek out opportunities to identify WMDVBE contractors and to expand WMDVBE source pools;

(2) Actively support the efforts of organizations experienced in the field who promote the interests of WMDVBE contractors;

(3) Work with WMDVBE contractors to facilitate contracting relationships by explaining utility qualification requirements, bid and contracting procedures, materials requirements, invoicing and payment schedules, and other procurement practices and procedures;

(4) At the request of any unsuccessful WMDVBE bidder, provide information concerning the relative range/ranking of the WMDVBE contractor's bid as contrasted with the successful bid. Information on additional selection criteria, such as warranty periods, maintenance costs, and delivery capability, shall be provided when requested if disclosure would not violate the proprietary nature of the specific contract element;

(5) To the extent possible, make available to WMDVBE contractors lists of utility purchase/contract categories which offer them the best opportunity for success;

(6) Encourage employees involved in procurement activities to break apart purchases and contracts as appropriate to accommodate the capabilities of WMDVBEs;

(7) Summarize this general order in its outreach program handouts. Such summaries shall state that WMDVBEs will be furnished a complete copy of this general order upon request.

6.3. **Subcontracting Program**

Each utility shall establish and maintain a subcontracting program for the purpose of encouraging its prime contractors to utilize WMDVBE subcontractors.

6.3.1. The subcontracting program shall serve as an enhancement to, and not has a replacement for, the utility's WMDVBE prime contractor outreach program.

6.3.2. The subcontracting program shall apply to the following:

(1) Purchases/contracts exceeding $500,000 for products and services;

(2) Construction contracts exceeding $1,000,000;

(3) Purchases/contracts which offer WMDVBE subcontracting opportunities, regardless of value, where appropriate.

6.3.3. The subcontracting program need not be applied to the procurement of products manufactured for general consumption, such as paper, pens, and the like, or to the procurement of products and services in excluded categories.

6.3.4. Each utility shall encourage and assist its prime contractors to develop plans to increase the utilization of WMDVBEs as subcontractors. Prime contractors shall be encouraged to submit to the utility plans that include goals for the utilization of WMDVBEs as subcontractors. These plans may be incorporated into the contract between the utility and the prime contractor. The prime contractor may submit periodic reports on its compliance with the plan to the utility.

6.3.5. Each utility is encouraged to incorporate in all purchase orders, requests for bid proposals, and other appropriate procurement documents related to procurement efforts subject to the subcontracting program, a statement similar to the following:

UTILIZATION OF WOMEN, MINORITY AND DISABLED VETERAN OWNED BUSINESS ENTERPRISES

(1) It is the policy of the utility that women, minority and disabled veteran owned business enterprises shall have the maximum practicable opportunity to participate in the performance of contracts.

(2) The contractor agrees to use his or her best efforts to carry out this policy in the award of subcontracts to the fullest extent consistent with the efficient performance of this contract.

(3) The contractor agrees to inform prospective WMDVBE subcontractors of their opportunity to request from the clearinghouse a verification application form and to return the completed form to the clearinghouse for processing and inclusion in the database.

6.3.6. Each utility is encouraged to inform suppliers of products and services that subcontracting with WMDVBEs is a factor that will be considered in the bid evaluation process. A statement to that effect could be included in all appropriate procurement documents.

6.3.7. Each utility shall monitor and include in its annual report to the Commission a summary of prime contractor progress in increasing the participation of WMDVBE subcontractors.

6.3.8. Each utility shall include in its annual plan a description of future plans for encouraging both prime contractors and grantees to engage WMDVBE subcontractors in all procurement categories which provide subcontracting opportunities.

6.3.9. Each utility may include awards to verified WMDVBE subcontractors in its WMBE results.

7. COMPLAINT PROCESS

The following rules and guidelines shall be used for complaints relating to this General Order.

7.1. **Internal Utility Appeals Process**

Each utility shall provide a mechanism through which WMDVBEs or prospective WMDVBEs can present complaints to the utility's management.

7.1.1. Complaints shall first be submitted to a WMDVBE program administrator within a reasonable time after the event complained of. WMDVBEs should be encouraged to make their complaints in writing;

7.1.2. Complaints shall be reviewed and investigated by the administrator and the administrator's decision communicated to the complainant within twenty (20) working days of receipt of the complaint by the WMDVBE program administrator;

7.2. **WMDVBE Complaints to the Commission**

In the event that a WMDVBE believes that a utility WMDVBE program administrator's decision, or any other act or omission of the utility, violates any provision of law or of any order or rule of the Commission, the WMDVBE may file a complaint with the Commission pursuant to Public Utilities Code Section 1702 and Article 3 of the Commission's Rules of Practice and Procedure (Title 20, Chapter 1, of the California Code of Regulations). The Commission will not, however, entertain complaints which do not allege violations of any law, Commission rule, order, or decision, or utility tariff resulting from such Commission action, but which instead involve only general contract-related disputes between a utility and an existing or prospective WMDVBE, such as failure to win a contract award.

7.2.1. WMDVBE complaints filed with the Commission shall be handled in a timely manner in accordance with the Commission's Rules of Practice and Procedure. Pursuant to Rule 13, defendant utilities must answer such complaints within thirty (30) days. Complaints which do not allege that the matter has first been brought to the Commission WMDVBE Staff for informal resolution may, under Rule 10, be referred to the staff to attempt to resolve the matter informally. In appropriate circumstances, the expedited complaint procedure set forth in Rule 13.2 of the Commission's Rules may be utilized.

7.2.2. The Commission's Office of the Public Advisor may assist WMDVBEs in preparing to file complaints against utilities.

7.3. **Complaints Concerning WMBE Verification Decisions**

All complaints concerning a verification decision of the clearinghouse will be governed by the following procedures.

7.3.1. Business enterprises whose WMBE status has been denied by the clearinghouse, or who have been deverified by the clearinghouse, may appeal the clearinghouse's decision to the Commission after exhausting their remedies under the internal appeal process implemented by the clearinghouse, a copy of which will be provided by the clearinghouse upon request by the affected business enterprise.

7.3.2. Third parties may file complaints challenging the WMBE status of businesses whose WMBE verification is pending, or who have already been verified by the clearinghouse. Such complaints must: 1) be in writing and be addressed to the clearinghouse; 2) set forth with specificity the grounds for the challenge in ordinary and concise language; 3) include the name and address of the complainant; and 4) be served on the affected WMBE. Such complaints may include supporting documentation.

The clearinghouse will review third party complaints to determine whether there appears to be a factual basis for questioning the challenged party's WMBE status. If the clearinghouse determines that there appears to be an insufficient factual basis for the complaint, it shall inform the complainant and affected WMBE of this determination in writing within 20 business days of the receipt of the complaint. The clearinghouse shall inform the complainant of its right to appeal this determination to the Commission.

7.3.3. If the clearinghouse determines that there appears to be a sufficient factual basis for questioning the challenged party's WMBE status, it shall require the challenged party to provide the clearinghouse information sufficient to permit the evaluation of its WMBE status. Following a thorough review and evaluation of the information presented by both parties, and an opportunity for each party to respond to the clearinghouse proposed resolution of the verification challenge, the clearinghouse shall notify the parties of its final verification decision and of their right to appeal this decision to the Commission.

7.3.4. During the pendency of a third party challenge of a verified WMBE, the presumption that the challenged party is a WMBE will remain in effect.

7.3.5. If a third party complaint does not include the minimum criteria set forth above, or if the third party rescinds its complaint, the clearinghouse may review the complaint to determine whether it merits unilateral consideration by the clearinghouse.

7.4. **Commission Review of WMBE Verification Complaints** Complaints regarding clearinghouse verification decisions shall comply with Article 3 of the Commission's Rules of Practice and Procedure, except that the clearinghouse, rather than one or more utilities, shall be named as the defendant. When reviewing appeals of clearinghouse verification decisions, the Commission shall determine whether there is substantial evidence in the record, when considered as a whole, to support the conclusion reached by the clearinghouse.

8. GOALS

Each utility shall annually set substantial and verifiable short-term (one year), mid-term (three years), and long-term (five years) goals for the utilization of WMBEs. Goals shall be set annually for each major product and service category which provides opportunities for procurement. "Substantial goals" mean goals which are realistic and clearly demonstrate a utility's commitment to increase WMDVBEs' share of the utility's purchases and contracts.

8.1. The utilities shall consider the following factors in setting their goals:

8.1.1. Total utility purchasing and/or contracting projections;

8.1.2. Availability of WMDVBEs and competitiveness in the geographical area served by the utility;

8.1.3. Market dynamics based on historical data and trends;

8.1.4. Other appropriate factors which would increase the WMDVBEs' share of utility business.

8.2. Each utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases from outside vendors of not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises. For the purposes of this section, contracts with minority women owned business enterprises can be counted toward either the minority owned business enterprise goal or the women owned business enterprise goal, but not toward both. Similarly, contracts with disabled veteran business enterprises can be counted either as disabled veteran business enterprise procurement or the appropriate women or minority business enterprise goal, but not toward both.

8.3. The specification of initial long-term goals in this section shall not prevent the utilities from seeking to reach parity with public agencies, which the Legislature found in Public Utilities Code Section 8281 (b)(1)(B) are awarding 30% or more of their contracts to WMBEs.

8.4. Goals shall also be established for both minority women owned business enterprises and non-minority women owned business enterprises. These goals are to be a subset of the overall goal for WMBEs established by Section 8.2 (initially 20% for both women owned business enterprises and minority owned business enterprises). These goals are intended to ensure that utilities do not direct their WMBE procurement programs toward non-minority women and minority men owned business enterprises to the detriment or exclusion of minority women owned business enterprises.

8.4.1. Goals shall be set for each major category of products or services. Goals need not be set for products or services which fall within an "excluded category" created by a utility pursuant to Section 8.5.

8.5. A utility may create an "excluded category" of products or services where it is clearly evident that WMDVBEs do not provide a specific product or service, or that sole source procurement is the only available procurement method. The utility shall bear the burden of demonstrating the unavailability of WMDVBEs capable of supplying such products or services. Because there may in the future be WMDVBEs capable of supplying products or services in an excluded category, the utility must justify in its annual report the continued existence of any excluded category. Excluded categories must be noted in the utility's annual report to the Commission on WMDVBE program progress and future plans.

8.6. A utility which is presently purchasing products or services from affiliates may subtract the dollars paid to affiliates for these products or services from the total dollars used as the basis for establishing goals for purchases from WMDVBEs of these categories of products or services, provided that the utility encourages the affiliate to establish an appropriate subcontracting program where such affiliate employs subcontractors. Any utility which takes advantage of this section must in its annual report to the Commission state whether the affiliates have established a subcontracting program and describe the results of any such program. The utility's annual plan must describe any future plans to encourage such a subcontracting program. This section applies only to those utilities which are purchasing products or services from affiliates as of the effective date of this general order (May 30, 1988).

8.7. Goals for each specific product or service category shall be expressed as a percentage of total dollars awarded by a utility to outside vendors in that category; however, where appropriate, non-numeric goals may also be included.

8.8. Overall program goals shall be expressed as a percentage of total dollars awarded to outside vendors in all categories of products and services purchased by a utility other than products and services which fall within an excluded category established by the utility pursuant to Section 8.5, or which are included in a fuel procurement base established pursuant to Section 8.10.

8.9. Payments to other utilities and franchise tax fees, other taxes and postage need not be included in the standard procurement base used to establish goals.

8.10. Each utility may establish a separate fuel procurement base for reporting progress and establishing goals for procurement of fuels from WMDVBEs. Utilities choosing to report fuel purchases separately from the purchase of other products and services must follow the guidelines set forth below:

8.10.1. Fuel used to power vehicles, heat utility facilities, and supply emergency generators may not be included in the fuel procurement base. Such fuel must be included in the standard procurement base used to establish goals, unless the fuel is purchased from another utility and thus subject to the exclusion authorized herein;

8.10.2. The fuel procurement base must, at a minimum, include all purchases of natural gas from domestic onshore natural gas markets;

8.10.3. Utilities which purchase from WMDVBE suppliers fuels other than domestic onshore natural gas must include such purchases in the fuel procurement base because Section 8.5 does not permit utilities to exclude product and services categories for which there are available WMDVBEs;

8.10.4. Utilities may exclude purchases of fuel other than domestic onshore natural gas if such fuel qualifies for an exclusion under Section 8.5 and if the utility plans for and reports on progress in increasing the procurement of such fuels from WMDVBEs.

8.11. Each utility shall make special efforts to increase utilization and encourage entry into the marketplace of WMDVBEs in product or service categories where there has been low utilization of WMDVBEs, such as legal and financial services, fuel procurement, and areas that are considered technical in nature.

8.12. Except for any penalty imposed as a result of a Commission-initiated investigation, no penalty shall be imposed for failure of any utility to meet and/or exceed goals.

8.13. Utilities shall report their goals in their annual plans.

9. ANNUAL REPORT

Utilities shall serve twelve (12) copies on the Executive Director, by March 1 of each year, beginning in 1989, an Annual Report on their WMDVBE Program.

9.1. The Annual Report shall contain at least the following elements:

9.1.1. A description of WMDVBE program activities engaged in during the previous calendar year. This description shall include both internal and external activities;

9.1.2. A summary of WMDVBE purchases and/or contracts, with breakdowns by ethnicity, product and service categories compared with total utility contract dollars awarded to outside vendors in those categories;

9.1.3. An itemization of WMDVBE program expenses provided in the format required by the Cost Exhibit in D.89-08-026;

9.1.4. A description of progress in meeting or exceeding set goals and an explanation of any circumstances that may have caused the utility to fall short of its goals;

9.1.5. A summary of prime contractor utilization of WMDVBE subcontractors;

9.1.6. A list of WMDVBE complaints received during the past year, accompanied by a brief description of the nature of each complaint and its resolution or current status;

9.1.7. A summary of purchases and/or contracts for products and services in excluded categories.

9.1.8. A description of any efforts made to recruit WMDVBE suppliers of products or services in procurement categories where WMDVBE utilization has been law, such as legal and financial services, fuel procurement, and areas that are considered highly technical in nature.

9.1.9. A justification for the continued existence of any "excluded category" of products or services which has been removed from the procurement dollar base used to set goals because of the established unavailability of WMDVBE suppliers. Such justification must include a description of any efforts made to find and or recruit WMDVBE suppliers of products or services in the excluded category.

9.1.10. Each utility which elects to report fuel procurement separately must file with the Executive Director by March 1 of each year, beginning in 1991, a separate detailed and verifiable report on WMDVBE participation in fuel markets. These reports must include, at a minimum, the results of purchases in each fuel category.

a. Each utility shall report purchases by:
   1. Market origin and fuel type;
   2. Volume and dollar magnitude;
   3. Term of sale, e.g., spot, intermediate, long term;
   4. Ethnicity and gender of the supplier;

b. Each utility shall provide:
   1. An explanation of how existing and/or changing market conditions are affecting the utility's ability to meet or exceed its WMDVBE goals for fuel;
   2. A comprehensive description of the specific outreach programs used to seek WMDVBE fuel suppliers in each market in which fuel is purchased.
   3. A justification for any exclusion of a specific fuel category from the utility's fuel procurement base.

9.2. This general order is not intended to permit erosion of WMDVBE programs and reporting presently engaged in by a utility.

9.3. Nothing in this general order shall prohibit any utility from breaking down specific categories further than presently required (for example, reporting contracts awarded to Filipino Americans separately from those awarded to Asian Pacific Americans, or reporting male and female results within minority-owned classifications).

10. ANNUAL PLAN

Utilities shall serve twelve (12) copies on the Executive Director, by March 1 of each year, beginning in 1989, a detailed and verifiable plan for increasing women, minority, and disabled veteran business enterprises procurement in all categories.

10.1. The Annual Plan shall contain at least the following elements:

10.1.1. Short, mid, and long term goals set as required by Section 6 [sic, Section 8], *supra*;

10.1.2. A description of WMDVBE program activities planned for the next calendar year. This description shall include both internal and external activities.

10.1.3. Plans for recruiting WMDVBE suppliers of products or services where WMDVBE utilization has been low, such as legal and financial services, fuel procurement, and areas that are considered highly technical in nature.

10.1.4. Plans for seeking and or recruiting WMDVBE suppliers of products or services in any "excluded category" of products or services which has been removed from the procurement dollar base used to set goals because of the established unavailability of WMDVBE suppliers.

10.1.5. Plans for encouraging both prime contractors and grantees to engage WMDVBEs in subcontracts in all categories which provide subcontracting opportunities.

10.1.6. Plans for complying with the WMDVBE program guidelines established by the Commission as required by Public Utilities Section 8283(c). The Executive Director's Office will be responsible for developing, periodically refining, and recommending such guidelines for the Commission's adoption in an appropriate procedural forum.

11. COMMISSION REPORT

The Commission shall provide an annual report to the Legislature beginning in January, 1989, on the progress of activities undertaken by each utility to implement Public Utilities Code Sections 8281 through 8286 and this general order, as required by Section 8283(e).

11.1. In this report, the Commission shall recommend a program for carrying out the policy declared in the above-mentioned sections of the Public Utilities Code, together with recommendations for legislation it deems necessary or desirable to further that policy.

11.2. This report shall include recommendations to the utilities for the achievement of maximum results in implementing legislative policy and this general order.

Approved and dated June 3, 1992, to become effective June 3, 1992, at San Francisco, California.

PUBLIC UTILITIES
COMMISSION
STATE OF CALIFORNIA

By: Neal J. Shulman
Executive Director

DEFENDANT'S EXHIBIT B

LETTERHEAD OF PACIFIC BELL

February 1, 1991

Mr. Jack Bras
J. Jack Bras & Associates
90 Mission Drive
Pleasanton, CA 94566

Dear Mr. Bras,

We are requesting a some preliminary business information from firms that have recently provided architectural services to our Real Estate Management organization in the Bay Area.

One of our efforts to improve the overall quality or real estate services within Pacific Bell includes the development of improved business partnerships with the firms that we continue to do business with. We believe that those improvements are more likely to be accomplished with a limited number of affiliations and have begun to explore methods to reach that end.

At some future time, we plan to request comprehensive proposals from selected architectural firms based on the information we receive in response to the attached form. Those future proposals will serve as the basis for our final selection of architectural firms.

As a member of Pacific Bell's Supplier Management organization I will be representing the Real Estate Management group in the capacity of Contract Manager for architectural services in the Bay Area. Please feel free to call me on 415-823-0805 with any questions.

It is imperative that we receive this information by February 15, 1991, otherwise your firm will be disqualified from participating in our corporate long-term plans.

/s/ Paula S. Knapp
Paula S. Knapp
Contract Manager

Attachment

DEFENDANT'S EXHIBIT C

LETTERHEAD OF J. JACK BRAS AND ASSOCIATES ARCHITECTS

February 4, 1991

Paula S. Knapp
Pacific Bell
2600 Camino Ramon, Room 3 E 200
San Ramon, CA 94583

SUBJECT: PRE-QUALIFICATION CRITERIA

Dear Ms Knapp:

It is our pleasure to submit the enclosed Pre-Qualification Criteria form to you as requested.

We have provided professional architectural services to Pacific Bell since 1969, during which time we have successfully completed numerous projects ranging from equipment buildings to offices.

Our projects for Pacific Bell have always been done in a professional manner, completed on time, and within budget.

We hope that our past record speaks for itself, and we sincerely hope that you will continue to consider us as Architectural Consultants. We look forward to a continuing professional relationship with Pacific Bell.

Sincerely,

/s/ J. Jack Bras

J. Jack Bras

JJB:tt
Enc: Pre-Qualification Criteria form
Income Statement and Balance Sheet

LETTERHEAD OF J. JACK BRAS AND ASSOCIATED ARCHITECTS

PACIFIC BELL

REAL ESTATE MANAGEMENT — BAY AREA ARCHITECTS

PRE-QUALIFICATION CRITERIA

1. Please provide the number of licensed architects in firm?

   We currently have two licensed architects on staff.

2. How long has your firm been in business under the present name? If less than one year, explain the change in your corporate structure.

   I established the firm in 1964 under the present name.

3. Please provide a copy of your current Income Statement and Balance Sheet.

   See attachments.

4. Our records indicate $119,000 paid to your firm in 1990, please verify and correct this figure.

   Our figures show $122,807.03.

5. Has your firm provided design services for new construction or renovation of telephone company central office projects?

   Yes, several over the years since 1969.

6. Has your firm provided design services for new construction or renovation of telephone company administrative space projects?

   Yes, several over the years since 1969.

PACIFIC BELL
REAL ESTATE MANAGEMENT — BAY AREA ARCHITECTS
PRE-QUALIFICATION CRITERIA
(continued)

7. What is your CAD capabilities now?

   We are in the process of converting some details to Auto-CAD.

8. Are you willing to participate in future technologies to meet our requirements, such as Electronic Data Interface for billing?

   Yes, depending on specific review of the requests.

9. Is your firm capable of providing design services in the bay area counties of: San Francisco, Contra Costa, Alameda, and Santa Clara?

   Yes, we have done work over the years in Contra Costa, Alameda, and Santa Clara Counties.

10. Are you currently certified through the Cordoba Corporation Clearing House process for Minority/Women Business Enterprise status.

    No.

11. Are you willing to share your internal cost structures and work flow processes with us in an effort to jointly improve the quality process within both our firms.

    Yes.

/s/ J. Jack Bras 2/5/91

J. Jack Bras date

J. JACK BRAS & ASSOCIATES
ARCHITECTS

9-9-91
J. Jack Bras and Associates Architects
Jack Bras

Counties:
San Francisco
San Mateo
Alameda
Contra Costa
Santa Clara

SELECTED WEIGHTING CRITERIA OF 13 FIRMS

ATTRIBUTES:

QUALITY OF PAST PERFORMANCE
7th Ranking

Due to the unique requirements of Pacific Bell (Pacific), projects and special responsibilities assigned to our design firms, the quality of past performance is best judged by those field managers and engineers that are most familiar with their actual performance. Ranking was based on the experience of field managers in specific areas for performance, interaction, and process.

CENTRAL OFFICE DESIGN EXPERIENCE
2nd Ranking (2 firms tied)

The specialized nature and service affecting potential of central office projects is critical to Pacific Bell. Ranking was based on firms that have satisfactorily designed new central offices or renovations of existing central offices.

ADMINISTRATIVE SPACE DESIGN EXPERIENCE
3rd Ranking

Most architectural design firms have considerable experience in the design of administrative space. Ranking was based on experience in the design of unique telephone facilities for administrative space, operation quarters such as MC's, IC's, and other service center facilities.

MWBE STATUS
not applicable (non-minority)

Ranking was based on any firm that meets the official definition of a Minority or Women Owned Business (i.e., at least 51% ownership).

NUMBER OF LICENSED ARCHITECTS
3rd Ranking (5 firms tied)

Ranking was based on number of full-time architects.

NUMBER OF YEARS IN BUSINESS
1st Ranking (12 firms tied)

It is recognized that architectural firms undergo some changes in personnel and size, the experience level and continuity of the principle's involvement. Ranking was based on the number of years in business.

1990 EXPENDITURES
5th Ranking

Ranking was based on Pacific's utilization of the firm's services during 1990 and the existence of a current blanket contract.

CAD CAPABILITY
2nd Ranking (7 firms tied)

CAD capability is vital to efficient design procedures. Ranking was based on firms that are fully compatible with Pacific protocols (G.D.S. format) and AUTOCAD.

SIZE OF ORGANIZATION
4th Ranking (2 firms tied)

The size of a design firm can be critical to the firm's ability to provide, in a timely manner, all the design services required by Pacific. Ranking was based on the number of full-time employees including both principles and employees.

brief1

Exhibit 25

PACIFIC BELL LETTERHEAD

July 26, 1991

J. Jack Bras and Associates Architects
90 Mission Drive
Pleasanton, CA 94566

Dr. Mr. Bras,

This is in response to your letter of June 28 that has been referred to me by Mr. Quigley. We appreciate your interest and business relationship with Pacific Bell and would like to share our process with you.

Pacific Bell, in general, and our Real Estate Management department, specifically, are striving for improved quality in all areas of our business. This includes not only our internal processes but also the relationships with outside firms that supply products and services to us. We believe that these business relationships can best be developed by working closely with a small number of suppliers who become our "business partners" over a period of time.

Since a close relationship is very difficult to maintain when working with a large number of architectural firms, we, unfortunately, have had to sacrifice some past associations with very competent and professional firms such as yours. The process that we used to select architectural firms in the Bay Area included evaluation of current information that you submitted in your letter of February 4th. We also surveyed the past experiences of our project managers and field engineers with each firm.

I would like to assure you that your firm was very competitive and was not eliminated due to any unsatisfactory performance. If you would prefer a more detailed discussion of our selection process I would be happy to

arrange a meeting between yourself and our contracting managers.

Again, I appreciate your interest and the many contributions to our business. We plan to maintain your information on file and will be happy to consider Bras & Associates when our contract for architectural services is reevaluated in the future.

Sincerely,

/s/ Jack Behuresht

for M.J. Cochrane

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

J. JACK BRAS, individually and doing business as J. Jack Bras & Associates,

Plaintiff,

vs.

PACIFIC BELL, a Corporation, CALIFORNIA PUBLIC UTILITIES COMMISSION, PHILIP BREMOND in his representative capacity as MWDVBE Program Manager for the California Public Utilities Commission, NEAL SHULMAN in his representative capacity as Executive Director of the California Public Utilities Commission,

Defendants.

No. C92 0304 VRW

CONTINUED DEPOSITION OF JACK BEHURESHT

VOLUME II

Taken before DOREEN L. COVARELLI,

a Certified Shorthand Reporter

State of California

CSR No. 8039

October 16, 1992

EMERICK AND FINCH
CERTIFIED SHORTHAND REPORTERS
18 CROW CANYON CT. #185 SAN RAMON, CA 94583

what you're asking, are you asking whether if he did the math basically on this matrix and subtracted the M/WBE points from those vendors who were given those points what would the rankings be? Is that what you're asking him on this matrix?

MR. GARVIN: That's another way of putting it.

THE WITNESS: From a purely math perspective, Intergraph would have had a score of 47.4 and Bras would have had a score of 48. A .6 difference.

MR. BERG: You mean — you mixed two answers. You said a .6 difference. I think your answer will read 48.6.

THE REPORTER: I got it.

MR. GARVIN: Q. I hate to go through this again, but there is some confusion.

A. Sure.

Q. Correct me if I'm wrong, I think what you're telling me is that if you eliminate M/WBE as a factor here and subtract 10 points from the scores of Intergraph, that Mr. Bras would mathematically rate higher at 48.0 versus Intergraph at 47.4.

Is that a fair statement.

MR. BERG: Mathematically?

MR. GARVIN: Yes.

THE WITNESS: Yes.

MR. GARVIN: Q. On that mathematical basis, then, one would conclude, would one not, that Mr. Bras would rank No. 3 as to the overall 13 architects set forth in this matrix?

MR. BERG: Before you answer that, could you read the question back to me, please?

(Record read.)

MR. BERG: It's argumentative as to form, but otherwise, you can answer.

THE WITNESS: Mathematically, yes.

MR. GARVIN: Q. Now, was there some determination made at some point that you would — "you" meaning Pacific Bell — would complete this process by selecting the top three architectural firms?

MR. BERG: It's vague as to time.

MR. GARVIN: I said at the completion of this process.

MR. BERG: I know, but if you read your question, you're going to see it's vague as to when the decision was made.

MR. GARVIN: Q. Whenever it was made, at the end of the process you made a decision, did you not?

A. At the end of the process, we made a decision.

Q. And in this case, the decision was to award contracts to the three top firms, architectural firms, "the three top," meaning the three who scored the highest in this study?

A. No.

Q. What was your decision?

A. The decision was to engage the top three for a negotiation.

Q. I see. And had M/WBE — strike that.

When you say "top three," you mean reduced the number from 13 to 3?

A. The — well, the top three firms, Garcia/Wagner, Intergraph and Roja, they were subject of further review and negotiation because potentially, we may not have reached an agreement to go any further.

Q. I understand this is kind of a preliminary screening?

A. Correct. It was just a guide for us to go through successive steps.

Q. Now, getting back to Mr. Bras, had the M/WBE status been eliminated as a factor, he would have been or survived that preliminary screening and been within one of the three firms.

Is that a correct conclusion?

A. No, that is not a correct conclusion.

Q. Where am I wrong?

A. The way we look at it is we put emphasis on expense of central office work and also administrative work and one of the objectives would have been for us to ensure that we had more than one firm that could deliver these type of services.

On this particular scenario that you described, had Mr. Bras been the third firm, we would have been in a very awkward position of not having an architectural — not having more than one architectural firm that was proficient on the administrative space design experience. And then there are other factors, as well.

Q. Let's take them one at a time, then.

Are you telling me that you would have some difficulty because Mr. Bras did not have the administrative design experience?

A. With Pacific?

Q. With Pacific. At least sufficient for your purposes?

A. Based on the ratings provided by the project field people.

Q. And I think you said that you'd only be left with one firm with that kind of experience had Bras been in that top three?

A. Correct.

Q. And what firm would that have been?

A. That was Garcia/Wagner.

Q. And with Intergraph, in fact, being within the top three, can you consider, "you" being Pacific Bell, that Intergraph had sufficient administrative design experience to satisfy your needs?

A. Based on the rating provided by the field people, yes.

Q. I take it by this rating in Exhibit 11, the matrix, Roja even had less administrative design experience that Mr. Bras?

MR. BERG: Excuse me. You misstated. I think you're talking about Exhibit 12.

MR. GARVIN: I'm sorry. Exhibit 12. Did I say 11?

MR. BERG: Yes.

MR. GARVIN: Change that to 12.

MR. BERG: Now, can I hear the question again? What was the question, unless you want to say it again.

MR. GARVIN: I can say it again.

Q. Referring to Exhibit 12, as to the attribute of administrative design experience, you would conclude that Mr. Roja or the Roja firm even had less administrative design experience of Mr. Bras.

Is that a correct conclusion?

A. Based on the ratings, he received a 1 and Bras received 4.

Q. So was this data set forth in Exhibit 12 the only data on which you, Pacific Bell, relied on in making the preliminary cut, so to speak?

MR. BERG: Vague and ambiguous as to the word "preliminary cut."

MR. GAVIN: Q. I mean a cut from 13 to 3, which I was told was a preliminary matter.

A. Based on the analysis of the data, yes.

Q. Data set forth in 12, Exhibit 12?

A. Yes.

Q. Now, you'll notice referring to Exhibit 12.

present concerns about Bras' organization as to how may people it had. It was a hypothetical question and that was the context.

MR. GARVIN: Well —

THE WITNESS: I was mentioning to you some additional factors that went into analysis of the data, if you will, that, for example, mathematically it is possible that second through fourth and fifth would have all had bottom-line scores that were identical.

MR. GARVIN: Q. Mathematically possible?

A. That is possible. And that obviously would require us to do some additional analysis. So you can see where there is other factors that would have been considered.

Q. Let's shift from the hypothetical to what was. When you got to the three top scorers, Roja, Intergraph and Garcia, mathematically they all met that threshold?

MR. BERG: What threshold? That assumes facts. There is no minimum or maximum points that he's testified to.

MR. GARVIN: Q. I'm stuck with this number three. Did you make some determination, "you" meaning Pacific Bell, that you wanted to reduce the number to three firms?

A. Yes, we did.

Q. So mathematically on this matrix, you picked the top three firms mathematically speaking?

A. We did not pick the top three exclusively based on the mathematics. In other words, I look at the top three to ensure that the top three would provide the balance capabilities that we needed.

Q. And did you make that determination?

A. Yes, I did.

Q. So as it so happens in this case, mathematically the top three firms mathematically just happened to look good to you on balance after looking over the whole process?

MR. BERG: Objection. Argumentative as to form.

MR. GARVIN: Q. Is that true?

A. When I looked at the results, the top three firms appear to have a well balance of the capabilities we were looking for so that basically allowed us to then go to the next step of beginning the dialogue on association with them.

Q. When you talk about the — what did you call it, the qualities you were looking for —

A. The capabilities.

Q. — the capabilities you were looking for?

A. Right.

Q. Can you spell out these capabilities? In other words, are they spelled out here in the matrix or were there some other capabilities you were looking for other than what was considered in these attributes?

A. Primarily they are the attributes that are stated in the matrix, however, primarily that's what it is.

Q. Then you went on into negotiating or you had — why don't you tell me what happened after that.

A. Well, this was a guide for this stage of the process. This would eventually identify certain ranking. We would analyze it, then we would decide who are the three firms, engage in further dialogue and provide us with additional data. They would have to review our contracts because we also change our contracts and so there was quite a bit of involvement that would take place subsequent to this and if, let's say, one of the firms would not prevail, we would have then gone back to the list, taken the next one and successive

negotiation and eventually we could have arrived at a list of three.

Q. When you say you would take the next one, you mean the next one that scored highest mathematically?

A. The next one in a balanced way would compliment the ones that we had.

Q. I thought I saw a document of that process that occurred afterwards.

A. Sure. I —

Q. I guess what I'm looking for was there a letter that went to Garcia, Roja and Intergraph after this preliminary process ended, a letter inviting them

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Attorney for Plaintiff
J. JACK BRAS, individually
and doing business as
J. JACK BRAS & ASSOCIATES

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

J. JACK BRAS, individually and doing business as J. JACK BRAS & ASSOCIATES,

Plaintiff.

v.

PACIFIC BELL, A CORPORATION, CALIFORNIA PUBLIC UTILITIES COMMISSION, PHILIP BREMOND in his representative capacity as MWDVBE PROGRAM MANAGER for the California Public Utilities Commission, NEAL SHULMAN in his representative capacity as Executive Director of the California Public Utilities Commission,

Defendants.

Civil No. C 92 0304 VRW

DECLARATION OF J. JACK BRAS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, JACK BRAS, hereby declare that:

1. I am a white male;

2. At all times material herein I have been and continue to be a licensed architect in the State of California and engaged in the private practice of architecture under the name of J. Jack Bras & Associates with offices at 90 Mission Drive, #6, Pleasanton, CA 94566;

3. At all times herein material I have had in my employ another licensed architect named Hugh Anton;

4. Commencing sometime in 1969 until early 1991 I have continuously provided architectural services to Pacific Bell on a project by project basis upon the issuance of a work order governed by a succession of three year contracts, the last one being issued June 30, 1989. This contract only applies if and when Pacific Bell chooses to award me a work order;

5. For the period 1983 through 1990 revenue generated by the Pacific Bell account for architectural services performed by my firm approximated 30% of gross receipts.

6. Sometime in early February, 1991, I received a letter from Paula S. Knapp, contractor manager for Pacific Bell. (Exhibit "5".) As noted this letter solicited current information for evaluation purposes to determine whether I, as well as other architects provided services to Pacific Bell, could continue in that relationship. I responded by letter of February 4, 1991 (Exhibit "6") including in that transmittal my response to Pacific Bell's "Pre-Qualification Criteria." (Exhibit "6".) As will be noted, Question No. 10 inquired, in substance, as to whether I was certified as a minority/women business enterprise as to which I responded "no," that being the truth of the matter;

7. From and after my response to Paula Knapp's letter of February 4, 1991 I did not receive any further architectural business from Pacific Bell except later, after I threatened a lawsuit following lengthy exchanges of correspondence as well as a meeting and then only to the extent of a few small projects;

8. The next indication I received that Pacific Bell was utilizing WMBE status as a factor in determining with whom they would do architectural business in the future came in a telephone call from Paula Knapp to my associate, Hugh Anton, on April 16, 1991 seeking to affirm that my architectural firm did not have WMBE status. See the Declaration of Hugh Anton in that respect;

9. Receiving no further new assignments from Pacific Bell I then wrote to Phil Quigley, President and CEO of Pacific Bell by letter of June 28, 1991. (Exhibit "7".) In that letter I complained about the unexplained loss of business. In response to my letter I received a letter from Mr. Jack Behuresht, Pacific Bell's Director of Project Management-Real Estate explaining Pacific Bell's desire to reduce the number of suppliers who would become "business partners" over a period of time — a relationship I had enjoyed with Pacific Bell for over twenty years. Mr. Behuresht further, in that letter, assured me that my firm was very competitive and that I was not eliminated due to any unsatisfactory performance. (Exhibit "8.")

I responded to Mr. Behuresht's letter by my letter of August 19, 1991 (Exhibit "9") questioning whether the "selection process" was fundamentally grounded upon racial considerations. Thereafter, a meeting was held at Pacific Bell's offices on September 10, 1991 attended by myself, my associate Hugh Anton, Jack Behuresht, Paula Knapp and John Couch. Once again I received no definitive answer as

to why I had been eliminated but was given a document entitled "Selected Weighting Criteria of 13 Firms" (Exhibit "11") setting forth my ranking as to various criteria or factors in comparison with twelve other firms. The factor relating to MWBE status was, on that document, labeled as "not applicable" which turned out to be an untrue statement.

10. On September 24, 1991 I sent a letter back to Mr. Behuresht (Exhibit "10") which, among other things, questioned whether WMBE status was indeed a factor in the selection process. In response to this, I received a letter from Mr. Behuresht dated October 16, 1991 (Exhibit "12") which, among other things, admitted that while each firm was not ranked with respect to its WMBE status, it was one of the criteria used in the selection process;

11. The person who owns the architectural firm called Intergraph is a person named George Grover who I know to be an Asian Pacific American. Mr. Grover's firm, Intergraph, is thus an MBE firm, his firm being one of the three selected to provide architectural services to Pacific Bell instead of my firm, a non-MBE firm;

12. I earnestly desire my long term business relationship with Pacific Bell in the performance of architectural services to it in the future and stand ready, willing and able to provide such services should I be given an opportunity to do so;

13. I did settle my claim for money damages against Pacific Bell under an agreement whereby 50% of the monetary consideration represented recovery for economic damages and the other 50% representing recovery for non-economic damages. I further represent that the amount recovered for economic damages provided some measure of recovery as to past loss of revenues with little, if any,

consideration being paid for loss of future revenues caused by this wrong which has been perpetrated against me.

I hereby declare that I have personal knowledge of each and every fact as stated herein and am competent to testify thereto if called as a witness at trial. I declare under penalty of perjury that the foregoing is true and correct and that this declaration is ecuted at Pleasanton, California on January 21, 1993.

/s/ J. JACK BRAS

J. JACK BRAS

Decision 90-10-032 October 12, 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

MUSE CORDERO CHEN, INC.,
Complainant,

vs.

PACIFIC BELL (U 1001 C),
Defendant.

Case 89-06-058
(Filed June 28, 1989)

J. Melvin Muse, for Muse Cordero Chen Inc., complainant.
Mary Vanderpan, Attorney at Law, for Pacific Bell, defendant.

OPINION

Muse Cordero Chen, Inc. (Muse), an advertising agency, seeks an order that Pacific Bell (Pacific) cease and desist from conducting its minority business enterprises program in a discriminatory manner. Pacific denies discrimination. Public hearing was held before Administrative Law Judge Robert Barnett.

The basic facts leading to the alleged discrimination are not disputed. In April 1988 Pacific issued a press release in which it announced that it sought "an Asian-owned and operated advertising agency to develop advertising and brochures in Chinese, Vietnamese and Korean." Muse, which had done advertising business with Pacific, responded. A Pacific employee, Ms. Joyce Sand, telephoned Mr. David Chew, a partner of Muse, to discuss Muse's qualifications. Ms. Sand asked about the minority makeup of the Muse agency. Mr. Chew said his company was not 51% Asian-owned and operated, but was owned by a black, a Hispanic, and an Asian. The percentage ownership is 70% black, 15% Hispanic, and 15% Asian. Ms. Sand said that

because Pacific's ad campaign was targeted at the Asian community Pacific required an advertising agency that was at least 51% Asian owned and operated; since Muse did not meet that criterion, she said it was disqualified from participating in the selection process. Seventy-four agencies had responded to Pacific's press release and eventually two were selected, both of which were at least 51% owned and operated by Asians.

Muse contends that because it is minority owned and operated, it should not have been disqualified from competing for the advertising business. It asserts that Pacific's requirement that its ad agency be of the same ethnic group as the target community is discriminatory.

Muse witness Chen testified that Muse had produced Asian targeted ads for Pacific Bell designed to increase ethnic awareness of the Universal Lifeline Telephone System which resulted in an increase in awareness 156% higher than PacBell's expectations, and that when Muse didn't get the disputed PacBell account, a lot of people wrote letters on its behalf. (Tr. 124-125.)

Pacific presented four witnesses who testified in support of Pacific's policy of using ad agencies of the same ethnic background as that of the target group. Ms. Beatrice Molina, a former past president of the Mexican American Political Association and the owner and operator of a 100% Hispanic advertising agency, testified that Pacific's policy was reasonable and furthered the aims of the various minority communities. She testified that she was, and is, an active member of numerous civil rights groups. Those groups have had problems with past advertising campaigns of large organizations like Pacific. Products developed by non-ethnic enterprises for a particular minority market, in her case, the Hispanic, were often of poor quality, were insensitive to the culture, and reflected a poor public image for the advertiser. Of equal importance she said was the need for the ethnic

community to benefit financially from the relationship with the advertiser. It is not enough that a major White-owned firm hires a minority employee to do the actual ad work; the profit from the job and the prestige of representing a large advertiser should stay in the minority community. In her opinion, the target minority agency brings ethnic and cultural sensitivities that a non-ethnic agency can never attain. She asserted that the minority organizations of which she is a member support the principle that when an Asian community is targeted by an advertising campaign, an Asian ad agency should get the job; when a Black community is targeted, a Black agency should get the job; and when the Hispanic community is targeted, an Hispanic agency should get the job.

Molina conceded that the Asian community consists of a number of subcommunities such as Koreans, Chinese, Japanese, Taiwainese and so on, and that there are extensive cultural differences between such subcommunities. She testified that Asian targeted advertising is far more complicated than advertising to Hispanic communities:

> "The Hispanic community, at least there's a commonality of language. In the Asian communities there's not that much commonality, and there certainly isn't in language, there certainly isn't in use of verbiage, use of address, use of culture, use of color. They're extremely different.
>
> "And some of the no-nos that have been done is they tried to use one Asian visual effect to encompass all Asian cultures, and you can't possibly do that without offending somebody." (Tr. 56-57.)

The Executive Director of Self-Help for the Elderly, a nonprofit service organization, testified by affidavit that the expertise of an Asian advertising agency is the best way in which the cultural awareness of the Asian communities can

be incorporated in ads targeted to the Asian community. The Asian-owned and operated agency will be aware of the cultural appropriateness of even simple things such as what color to wear and what words to use. The Asian-owned agency will know of the Asian owned newspapers and television stations. And especially, the Asian-owned agency will know of the subtle differences between the numerous Asian cultures—Chinese, Japanese, Korean, Vietnamese, etc.

Pacific's Executive Director of Marketing Communications testified that it was Pacific's policy to use an ad agency of the ethnic makeup of the target customer group. Pacific's concerns were the same as the previous witnesses': The agency should be expert in the culture of the target community, be best able to communicate with the target community, and be able to retain in the target community the intangible benefits of representing a large company. He said that he had three ad campaigns targeted to minority communities—the Black community, the Hispanic community, and the Asian community. In each case the ad agency that was awarded the contract was at least 51% owned and operated by persons of the target minority group. In his opinion, Pacific receives a better work product by having a 51% owned and operated target group requirement. He testified that the sole reason for eliminating Muse for consideration for the Asian ad work was the fact that Muse was not 51% or more owned and operated by Asians. However, all minority ad agencies are considered for all advertising contracts, except those targeted to specific minority groups.

When asked "suppose there is a second-, third-, or fourth-generation Japanese-American advertising professional, owns an advertising agency, but he has no knowledge at all of Asian languages. And he will be qualified because he owns 51 percent to that agency, in your review of Asian

advertising agencies?", the marketing director responded: "He might be initially qualified." (tr. 98-99)

The Director of Women and Minority Business Enterprise (WMBE) Programs for Pacific testified that she supported Pacific's policy for the same reasons given by the other witnesses. She said that since 1984 total dollars spent with WMBE firms increased from 3% of purchasing to 11% in 1989, or from $94 million annually to $200 million. Pacific has used a target community criterion for selecting a vendor in only three instances to date, the three ad campaigns targeting the Black, Asian, and Hispanic communities. In terms of total dollars, the three campaigns are a very small part of Pacific's minority business expenditures.

Discussion

In 1986 the Commission was directed by the legislature to establish guidelines for electric, gas, and telephone utilities with gross annual revenues exceeding $25,000,000 to be utilized by the utilities in establishing plans to increase women and minority business enterprise procurement in all categories. A minority business is defined as one at least 51% owned and operated by Black Americans, Hispanic Americans, Native Americans, or Asian Pacific Americans. (Public Utilities (PU) Code §§ 8281-8285.) Pursuant to that directive, the Commission promulgated General Order (GO) 156 "Rules Governing the Development of Programs to Increase Participation of Female and Minority Business Enterprises" (Adopted April 27, 1988, effective May 30, 1988, D.88-04-057 in R.87-02-026; modified by D.88-09-024.) The general order adopted the statutory definitions of women and minority owned and operated businesses and provided details of how the individual utilities should set up their plans, establish a clearinghouse to identify and verify women and minority businesses, establish goals, and report

annually to the Commission. The businesses affected by the general order are referred to as WMBEs.

The question presented in this complaint is whether a utility which targets a particular minority group as the recipient of an advertising campaign may limit its search for a WMBE advertising agency to an agency that is at least 51% owned and operated by members of the target group. We hold that it may not.

Complainant asserts, and defendant does not dispute, that complainant was not considered for the advertising contract solely because it was a Black owned and operated WMBE. Defendant asserts that the advertising contract was awarded to a qualified WMBE, an Asian American enterprise, and that complainant was not considered for the contract for a substantial business reason: the WMBE from that target community brings ethnic and cultural sensitivities that an outsider cannot attain, and revenue from the contract stays in the target community.

Muse claims discrimination and cites *City of Richmond v. Croson Co.* (1989) 488 US __, 102 L Ed 2d 854 in support of its position that a race-conscious classification is suspect, and that Pacific, when awarding a contract to a WMBE, should look no further than determining if the applicant is a WMBE.

In *Croson*, the City of Richmond adopted an ordinance which required non-minority-owned prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of the contract to Minority Business Enterprises (MBE). A White owned company was the only bidder on a city contract but did not have any MBE participants. The city refused to honor the bid and decided to rebid the project. The contractor sued to have the ordinance declared unconstitutional under the equal protection clause of the Fourteenth Amendment. The Supreme

Court held the ordinance to be invalid under the equal protection clause. It said that classifications based on race are suspect and subject to strict scrutiny, but may be valid as a remedy for past discrimination.

Croson considered the constitutionality of a city ordinance which established a 30% set aside for minorities. Muse attacks neither the enabling statute (Public Utilities Code §§ 8281-8285) nor our general order (GO 156) and so their validity is not before us; therefore, Croson is not directly applicable.

The question before us is not whether the statute and general order are valid, but rather whether it is permissible for Pacific to use race or ethnicity as the sole criteria to determine who may be considered for advertising contracts aimed at specific ethnic groups.

After a careful review of the record, we conclude that Pacific's decision, however well intentioned, to exclude Muse from consideration for Asian targeted advertising contracts solely on the basis of the race of Muse's owners was impermissible.

We have no problem with Pacific's desire to make sure that ethnic community targeted advertising is effective, and with the proposition that if advertising is to be effective it must consider the language and customs of the target group. We recognize that membership in the targeted group may well give an advertiser a natural advantage in this area.

We do, however, have a problem with the assumption that the only way to find the best advertiser for such a targeted campaign is to exclude from consideration all those who are not members of the targeted group.

Here, Muse witnesses testified that Muse had successfully engaged in Asian targeted ad campaigns for Pacific in the past, and had achieved results far exceeding the utility's goals. Muse was clearly qualified to create Asian targeted

ads even though Muse is not owned by Asians. Since Muse was at the outset eliminated from consideration solely because it was not 51% Asian owned, as defined in GO 156, it is impossible to determine whether Muse was more or less qualified than the advertising agencies ultimately awarded the contract in question.

Pacific's witnesses not only conceded that the Asian community was highly diverse, making it unlikely that a representative of one Asian subcommunity would have any special expertise regarding the language or cultural heritage of another Asian subcommunity, they conceded that a fourth-generation Japanese-American with no knowledge of any Asian language or culture would have been allowed to bid for the Asian targeted ad campaign contract. Muse, with its demonstrated expertise in the field, was not allowed to have its bid even considered.

Because the Commission does not award damages, there is little reason for us to delve into the procedural and substantive issues that might be addressed in discrimination litigation under various statutes and constitutional provisions. Neither party adequately addressed these issues, and we decline to make detailed findings regarding Pacific's compliance with these laws on the basis of the record in this proceeding.

Next, we will review Muse's allegation that Pacific's actions violated GO 156. We believe it is also necessary to review those actions in light of the legislation it implements, PU Code §§ 8281-8285. We find there are conflicting ways to view Pacific's actions under this statute and our regulations.

PU Code § 8281(a) states in pertinent part that:

"The Legislature hereby finds and declares that the essence of the American economic system of private enterprise is free competition. Only through full and

> free competition can free markets, reasonable and just prices, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of that competition is basic to the economic well-being of this state and that well-being cannot be realized unless the actual and potential capacity of women and minority business enterprises is encouraged and developed."

Section 8281 goes on to note that:

> "It is in the state's interest to expeditiously improve the economically disadvantaged position of women and minority business enterprises," (§ 8281(b)(1)(C),"

and that:

> "(F) That procurement also benefits the public utilities and consumers of the state by encouraging the expansion of the number of suppliers for procurements, thereby expanding competition among the suppliers and promoting economic efficiency in the process."

Section 8281(b)(2) declares that:

> "It is the purpose of this article to do all of the following: . . ." (B) Promote competition among regulated public utility suppliers in order to enhance economic efficiency in the procurement of electric, gas, and telephone corporation contracts . . .."

Section 4.2.1.1 of GO 156 states that utilities are to [a]ctively seek out opportunities to identify WMBE contractors and to expand WMBE source pools . . .."

The logic calling for inclusion of WMBEs as a class within the list of suppliers from whom the utilities procure goods and services calls equally for the inclusion of all qualified WMBEs within the class of suppliers who are considered for a particular utility contract. In either situa-

tion, the pool of potential supplier competitors is expanded by a policy favoring inclusion rather than exclusion of potential suppliers. Pacific's exclusion of non-Asian bidders from consideration for its Asian targeted ad campaign clearly diminishes the opportunity for non-Asians to do business with utilities. For this reason, Pacific appears to have violated the spirit if not the letter of PU Code §§ 8281-8285 and GO 156.

There is, however, a countervailing policy consideration. As Pacific points out, a natural byproduct of its effort to develop business relationships with WMBEs is a commitment to make business opportunities available to a cross-section of qualified WMBEs. We agree with Pacific that this commitment is neither inconsistent with nor prohibited by GO 156.

Having concluded that Pacific's decision to consider only bids by Asian businesses for its Asian targeted ad campaign and was not an appropriate method for ensuring the selection of the best firm for the job, we will order Pacific not to use race, national origin, or ethnicity as the sole basis for determining whose bids will be considered for contracts for the procurement of goods and services.

Further, PU Code § 453(b) states that "No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of race . . . [or] national origin . . ." We believe that Pacific's conduct in this case violated Section 453(b) and we shall so find.

Once again, we emphasize that while a utility may not arbitrarily exclude a class of persons on grounds unrelated to their qualifications, the utility retains its authority to use its legitimate business judgment to select the best person for the work at hand. Advertisers from the targeted community may have a natural advantage regarding cultural sensitivity. But members of all racial, ethnic, and national origin classi-

fications must be allowed to compete; no one can be excluded because of an assumption that one class of persons is unable to understand another.

As we noted earlier, since Muse was at the outset eliminated from consideration for the contract because its owners were not Asian we have no basis for determining whether Muse was in fact more or less well qualified to do Asian targeted advertising than the firms actually awarded the contract. It is, therefore, impossible for us to determine whether or not Muse would have been awarded the contract had it not been for the race of its owners. For this reason, we cannot grant Muse's request that we order Pacific to do business with it.

From a review of Pacific's 1989 report on the WMBE program, we note that Pacific has made steady progress over the last three years in increasing its purchases from WMBE vendors. This improvement has been consistent with the letter and the spirit of the program, and we commend Pacific for it. Given this record of accomplishment we hope that the instant case reflects an aberration or misunderstanding on Pacific's part rather than a fundamental problem, and we would encourage Pacific to continue its level of commitment to pursue further improvement in the coming years.

Findings of Fact

1. In April 1988 Pacific sought an Asian owned and operated advertising agency to develop advertising and brochures in Chinese, Vietnamese, and Korean.

2. Muse, an ad agency whose ownership is 70% Black, 15% Hispanic, and 15% Asian, applied for the contract but was not considered because it was not at least 51% owned and operated by Asians.

3. Muse has in the past successfully produced Asian targeted advertisements for Pacific.

4. Because Muse was at the outset eliminated from consideration for the Asian targeted advertising contract solely because it was not 51% owned by Asians, it is impossible to determine whether Muse was more or less well qualified than the firms actually awarded the contract.

5. PU Code §§ 8281-8285 and GO 156 encourage expansion of the pool of vendors of goods and services to utilities.

6. Neither PU Code §§ 8281-8285 nor GO 156 requires utilities to diversify their sources of supply within the WMBE community as a whole, but neither prohibits a utility from doing so.

7. Pacific's decision to consider only bids from advertising agencies which were at least 51% Asian owned and operated for its contract to provide advertising and brochures for the target Asian community was not an appropriate means for selecting the best agency for the job.

Conclusions of Law

1. Since Pacific's exclusion of Muse from consideration for the Asian targeted advertising contract occurred before any consideration of Muse's merit as an advertiser, it is impossible to determine whether Muse was more or less qualified than the firms actually awarded contracts; without such information, the contract relief requested in the complaint should be denied.

2. Pacific should be ordered not to use race, ethnicity, or national origin as the sole basis for determining who will be considered for contracts to supply the utility with goods and services.

3. Pacific's exclusion of Muse from consideration for the Asian targeted advertising contract constituted a violation of PU Code § 453(b).

ORDER

IT IS ORDERED that:

1. The contract relief requested in the complaint is denied.

2. Pacific shall not use race, ethnicity, or national origin as the sole basis for determining who will be considered for contracts to supply the utility with goods and services.

This order is effective today.

Dated October 12, 1990, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

I will file a written concurrence.

/s/ FREDERICK R. DUDA
Commissioner

Supreme Court, U.S.
FILED
DEC 14 1995
CLERK

No. 95-767

In The
Supreme Court of the United States
October Term, 1995

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,
Petitioner,

v.

J. JACK BRAS,
individually, and doing business as
J. JACK BRAS & ASSOCIATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether respondent has standing to challenge a California statute and implementing regulations of the Public Utilities Commission of the State of California ("Commission") that establishes voluntary goals, not quotas, set-asides or preferences, for the procurement of goods and services by public utilities from women and minority business enterprises in public utility procurement programs:

    a) Whether respondent has satisfied the injury-in-fact requirement where respondent failed to demonstrate that the statute and implementing regulations impose a barrier to his placing a bid for an architectural public utility contract; and

    b) Whether respondent has demonstrated a causal nexus between his alleged injury that is fairly traceable to the Commission where the alleged injury results from the independent acts of a third party public utility not before the court.[1]

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[1] The "Questions Presented" recited verbatim as set forth in the Petition are not in fact presented by this case and contain material misstatements of fact.

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In The

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J. JACK BRAS & ASSOCIATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent, J. Jack Bras, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner Public Utilities Commission of the State of California (hereinafter, "the Commission"). The Petition contains a multitude of misstatements of fact concerning the evidence put before the Court in the proceedings below. In addition, this Court has already resolved the previous conflict among circuit courts regarding Article III standing in equal

protection cases, by its 1993 decision of *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville,* 508 U.S. ___, 113 S.Ct. 2297 (June 13, 1993) which was determined during the time this case was on appeal to the Ninth Circuit Court of Appeals. Therefore, there is no compelling reason to grant the writ and it should be denied.

STATEMENT OF THE CASE

A. Statement Of The Facts

1. J. Jack Bras suffered a loss of utility business due to the WMBE Statute and General Order 156.

J. Jack Bras (hereinafter, "Bras") is a white male and a licensed architect. ER 54. Since 1969, he continuously provided architectural services to Pacific Bell, a utility regulated by the California Public Utilities Commission and now governed by the WMBE statute and General Order 156. ER 19, 55, App. 62-91.[2]

From 1969 through 1991, Bras provided architectural services to Pacific Bell on a project-by-project basis, upon issuance of a work order pursuant to a succession of three-year contracts. The last three-year contract was issued on June 30, 1989. For the period of 1983 through 1990, revenue generated from the Pacific Bell account approximated 30% of Bras' gross receipts. ER 55, App. 112.

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[2] References to the Excerpt of Record filed with the Ninth Circuit Court of Appeals are designated by ER. References to the Commission's appendix are designated by App.

In February 1991, Bras received a letter from Paula Knapp, Contract Manager at Pacific Bell. The letter requested that Bras submit his response to the enclosed "pre-qualification criteria" form. The letter stated that it was "imperative" that Pacific Bell receive the requested information by February 15, 1991 or "your firm will be disqualified from participating in our corporate long-term plans." ER 55, 114, App. 112, 92.

Bras submitted his response to the "pre-qualification criteria" form with letter dated February 4, 1991. The only negative response made by Bras on that form was that he was not "currently certified through the Cordoba Corporation Clearing House process for Minority/Women Business Enterprise status." ER 55, 114–117, App. 112, 116. (Commission omitted Bras' cover letter, appended hereto by Bras as Resp. App. 1.)[3]

On April 16, 1991, Hugh Anton, an employee architect of J. Jack Bras & Associates, received a phone call from Paula Knapp at Pacific Bell. Ms. Knapp inquired as to the firm's WMBE status and Mr. Anton informed her that J. Jack Bras & Associates was not a WMBE firm. ER 59–60 (not submitted by the Commission) ER 56, App. 113.

In June, 1991, Bras noticed he was not receiving any more assignments from Pacific Bell and complained about the unexplained loss of business to Phil Quigley, President and CEO of Pacific Bell by letter. ER 56, App. 113.

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[3] Since the Commission failed to present certain material evidence in its own appendix to its Petition, Respondent Bras has submitted additional documents in Respondent's Appendix, appended hereto and referred to throughout as "Resp. App."

In response, Bras received a letter signed by Jack Behuresht, Director of Project Management - Real Estate for Pacific Bell "for M.J. Cochrane," explaining that the process used to select architectural firms in the Bay Area included evaluation of the information Bras had submitted in his response to the pre-qualification criteria response letter. Bras was also assured in the letter that "(his) firm was very competitive and not eliminated due to any unsatisfactory performance." ER 56, 119, App. 113, 100.

Bras responded by another letter dated August 19, 1991 questioning whether the selection process used by Pacific Bell was grounded upon racial considerations and whether his firm was eliminated from consideration based upon racial classification. ER 56–57, 121, App. 113, Resp. App. 3.

Thereafter, in September, Pacific Bell representatives provided Bras with a document entitled "Selected Weighting Criteria of 13 Firms" which included notation of nine "attributes" used in evaluating and "ranking" the firms that had responded to the pre-qualification criteria questionnaire form. The listed "attributes" included quality of past performance; central office design experience; administrative space design experience; WMBE status; number of licensed architects; number of years in business; 1990 expenditure; CAD capability and size of organization. All "attributes" listed except WMBE status included a ranking for Bras in that category. As to the "WMBE status" attribute, Bras received no ranking because he was a "non-minority." The attribute description specified that ranking was only (received) by a firm that "meets the official definition of a Minority or Women Owned Business (i.e. at least 51% ownership)." ER 56–57, 124–125, App. 113–114, 97–99. Bras Continued to question Pacific Bell as to its selection

process by his letter dated September 24, 1991. ER 57, App. 114, letter attached in Resp. App. 5–7.

Later, in October 1991, Bras received further correspondence from Jack Behuresht, which admitted that:

> ...(T)he criteria included an indication of a firm's M/WBE status. In 1988 the California Public Utilities Commission adopted General Order 156 regarding utility purchasing from M/WBEs. **That order requires Pacific Bell to set goals for purchasing from M/WBEs of 15% of total purchasing dollars from minority-owned businesses and 5% from women-owned businesses by 1993.**
>
> **Since your firm is not a minority- or woman-owned business, the criterion was "not applicable." It was however, one of the criteria used in the selection process. ...**

ER 57, 126–127, Resp. App. 8–10. (emphasis added)

As it was later revealed, Bras would have been mathematically included in the top three architectural firms selected for further evaluation by Pacific Bell, had it not been for the lack of ranking because he was not a WMBE. ER 61–62, 64. Graphs produced by Pacific Bell during discovery and the deposition of Pacific Bell's Jack Behuresht showed that 10 points were given to those firms who were designated as WMBEs. ER 70, 128–130.[4] However, because Bras could

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[4] Exhibits 128, 129 and 130 were marked "Restricted Confidential" by Pacific Bell and were ordered to be filed under seal pursuant to the terms of a Stipulated Protective Order. The Commission procured a waiver of confidentiality from Pacific Bell regarding the "Pre Qualification

not receive points in the WMBE category, he ranked sixth of the thirteen responding architectural firms and was eliminated from further consideration. ER 68–71, 128–130, 76, (App. 104-107, 110), App. 46, Resp. App. 11–22.[5]

The evidence also showed that in order to meet its "minimum goals" under the General Order 156, Pacific Bell had apparently "loaded up" its architect/interior design category (31%, 24%) with MBEs and WMBEs to balance out categories such as Legal, Financial and Real Estate Services (2.7%, 1.4% and 2.3%) in which less MBEs and WMBEs were utilized. This enabled the utility to meet its overall "goal" while far exceeding it in certain categories, namely, architecture/interior design. ER 110–111, 113 [ER 110, 111 and 113 which are part of Pacific Bell's "M/WBE Annual Report, Plan and Cost Exhibit," February 23, 1990, were not submitted by the Commission].

Accordingly, the burden on non-minority architects and interior designers to compete for utility business appears considerably higher than that placed on non-minority financial, legal or real estate professionals contracting with the same utility. Yet there are no explanations of any reasons for this burdensome imbalance because no statistical analysis was ever presented of the ratio of qualified minority to qualified non-minority contractors or professionals in any

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Criteria" form [ER 130, App. 46] which the Commission has included in its Petition. However, neither of the graphs [ER 128, 129] showing actual application of the "Pre Qualification Criteria" by Pacific Bell were submitted to this court with the Petition. Respondent offers to supply copies of these documents to the Court upon request.

[5] The Commission has chosen to omit certain portions of the deposition transcript pages that were contained within the Excerpt of Record. To avoid unnecessary confusion, Bras has included all of Behuresht's deposition testimony submitted in the record in Resp. App. 11–22.

given category. Nor were any studies or statistical analyses presented to the court that could support such an imbalance in the procurement of minority or women owned contractors/professionals. (See ER 144-147, App. 62-68, WMBE Statute, General Order 156, ER 148-157, App. 69-91 and Defendant's Statement of Material Facts [ER 134-140 not submitted by the Commission].

2. Overview of the WMBE Statute and General Order 156.

In 1986, California enacted a body of law entitled "Women and Minority Business Enterprises" codified in California Public Utilities Code sections 8281 through 8286, (hereinafter, the "WMBE statute").

The stated object of the WMBE statute was to promote full and free competition by aiding the interests of women and minority business enterprises. ER 144–145. California Pub. Util. Code § 8281, App. 62-64. The statute sought to assure that a proportion of contracts and purchases made by utilities with gross annual revenues exceeding twenty-five million dollars ($25,000,000.) would be awarded to men and minority business enterprises defined therein as Black Americans, Hispanic Americans, Native Americans and Asian Pacific Americans. Disabled veteran business enterprises also came under the protection of the statute. ER 146. California Pub. Util. Code § 8283, App. 65-66.

General Order 156 was promulgated by the Commission to implement the WMBE statute. ER 90-108, App. 69-91. The Commission was also given oversight responsibility over the programs the individual utilities utilized to reach their "goals." ER 146. California Pub. Util. Code § 8283, App. 65-67.

The Order specifically directs that "each utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases from outside vendors of not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises." General Order 156, § 8.2, ER 154, App. 85.

In addition, the General Order required utilities such as Pacific Bell to submit annual reports to the Commission in accordance with the WMBE Statute and General Order 156 concerning the achievement of those "goals." ER 5, 6, 19, 105–106, General Order 156, §§ 9, 10, App. 53-54 [ER 19 not submitted by the Commission], 88-91.

Both the WMBE statute and General Order 156 are noticeably void of any participation or protection for competing non-minority enterprises. ER 96-103, General Order 156 §§ 5.1, 6.2, 6.3, 7, App. 78-84. For example, under the auspices of the WMBE Statute and General Order 156, it would be acceptable for the utility to contract/purchase from only minorities (or women), or to "load up" in one category to meet its target limits in another, as was alleged of the actions by Pacific Bell. ER 6–7, 104, General Order 156 §§ 8.7, 8.8, App. 53-54, 87.

Under the statutory scheme as implemented by General Order 156, a non-minority businessman is without any meaningful method of requesting relief from application of the statute or order, or for any other individualized or special consideration. ER 99, 103–104, 106, App. 82, 86-87, 89. Nor is he allowed to participate in the "Complaint Process" set forth in General Order 156 § 7, which is only open to

WMDVBEs and "potential" WMDVBEs. General Order 156 § 7.1, ER 99, App. 82.

Indeed, it appears that the non-minority enterprise is not even privy to the same type or quality of information that is available to the WMDVBEs, such as information concerning the particular method of goal setting by the individual utilities under the WMBE statute and General Order 156 or the areas in which the enterprise would have the "best opportunity for success." See General Order 156 § 6.2.1(3)(4)(5)(6), § 8.11, § 9.1.8, ER 97, 105, 106, 109, 112, App. 80-81, 89.

No evidence has been produced of any study conducted by the State of California, the California Public Utilities Commission or any particular utility governed by the WMBE statute or General Order 156 to ascertain the ratio of qualified minority enterprises to qualified non-minority enterprises in any category, in the geographical region subject to the statute or General Order 156. Indeed, the Commission requested information regarding whether such a study should be conducted in its Order Instituting Rulemaking, R.93-09-026, filed within days of the filing of Bras' opening appellate brief to the Ninth Circuit (appended to the Bras' Reply brief with a request for judicial notice, not opposed by the Commission). Resp. App. 23-45. Nor is there anything in the statute or General Order evidencing any intent of the legislature or the California Public Utilities Commission to enact and implement such law in favor of Women, Minorities and Disabled Veterans as a remedial measure for past discrimination. Moreover, there is no evidence of any study undertaken to satisfy the requirements of the *Croson* criteria set forth by the United States Supreme Court which apply to the race conscious preferences or "set-asides" contained in

the WMBE statute and California Public Utilities Commission General Order 156. Plaintiff's and defendant's respective statements of material undisputed facts, submitted on the cross-motions for summary judgment ER 49-53, 134-180 [not submitted by the Commission], and written statements in the Commission's brief to the Ninth Circuit and contained within its own Order Instituting Rulemaking, R.93-09-026, Resp. App.23-45. See also the subsequent "Interim Opinion" in that proceeding, dated August 3, 1994 of which judicial notice was also requested and unopposed. Resp. App. 46–65.

Accordingly, appellant, a non-minority white male, requested a declaratory judgment that the WMBE Statute and General Order 156 deny him Equal Protection under the laws and are therefore violative of the 14th Amendment to the United States Constitution, both on their face, and as applied since he has been and is still prevented from competing for utility contracts on an equal footing with minority architects under the statutory scheme.

Bras' claims included specific allegations and submission of proof concerning the loss of a particular contracting relationship **and** the strong **probability** that he will suffer future injury if the WMBE Statute and General Order 156 are not abrogated or enjoined.

3. Bras showed that there is a strong probability of future injury if the WMBE statute and General Order 156 are not abrogated or enjoined.

Bras showed that he had a history of successive three-year contracts with Pacific Bell for the performance of architectural services In addition, despite his elimination

from consideration (in 1991) detailed above, he "earnestly desire(s) to reinstate (his) long-term business relationship with Pacific Bell"...and stand(s) ready, willing and able to provide such services should (he) be given an opportunity to do so. ER 57, App. 114.

In addition, Bras received two separate letters from Pacific Bell which reiterated that it was satisfied with the services Bras had provided to it and that Pacific Bell would keep Bras' information in its files and "will be happy to consider Bras and Associates when (its) contract for architectural services is reevaluated in the future. ER 119, 126-127, App. 100-101, Resp. App. 8.

As the Ninth Circuit pointed out, there is no evidence on the record indicating that the settlement with Pacific Bell in any way prevents Bras from competing for future contracts. *Bras v. California Public Utilities Commission*, 59 F.3d 874 (9th Cir. 1995), App. 13. Indeed, the Bras' declaration stating his future intentions was submitted after his settlement with Pacific Bell. Accordingly, Bras has shown a strong probability that future injury will occur if the Statute and Order are not enjoined.

B. Proceedings Below

1. The Ninth Circuit Court of Appeals correctly reviewed, de novo, the Summary Judgment of the District Court.

The grant of summary judgment by a district court is appropriately reviewed de novo by the Ninth Circuit Court of Appeals. *First Pacific Bank v. Gilleran*, 40 F.3d, 1023, 1024 (9th Cir. 1994). The duty of the Appeals Court is to

determine whether, in viewing the evidence in the light most favorable to the non-moving party, there was a genuine issue of material fact for trial and whether the District Court correctly applied the law. *Id.* (as cited in *Bras v. California Public Utilities Commission*, 59 F.3d, 869, 872 (1995), the underlying decision of the Ninth Circuit to which the Commission's Petition for a Writ of Certiorari has been brought.)

2. The Issue on Appeal was whether Bras had Article III Standing to continue his Equal Protection Challenge to the WMBE Statute and the Commission's General Order 156.

The District Court granted the Motion for Summary Judgment brought by the Commission on the basis that Bras lacked standing. The District Court held that Bras lacked standing to pursue his claims for declaratory and injunctive relief after the settlement of his damages claims against Pacific Bell. ER 253, App. 39.

There are three requirements for Article III standing. First, plaintiff must have suffered an "injury-in-fact," which means an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not "conjectural" or "hypothetical." Secondly, there must be a causal connection between the injury and the conduct complained of—meaning that the injury is fairly traceable to the challenged conduct and not the result of the independent action of a third party not before the court. Lastly, it must be likely, as opposed to merely "speculative" that the injury will be redressed by a favorable decision (citations omitted). *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992).

3. The Commission and District Court relied upon the Standing Test then advocated by the Eleventh Circuit which was overruled by this Supreme Court during the pendency of the *Bras* appeal.

The District Court relied upon Eleventh Circuit precedents, including the case of *Cone Corp. v. Florida Dep't of Transp.*, 921, F.2d 1190 (11th Cir. 1991), and found that Bras failed to meet the "injury-in-fact" requirement of Article III standing because he had not proven the loss of future business as a result of the WMBE Statute or General Order 156 and had not shown that "but for" the Statute or Order, Bras would have been awarded a contract. ER 250-255, App. 36-41.

Generally, prior to this Court's decision of *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. ___, 113 S.Ct. 2297 (June 13, 1993) (*"Northeastern Fla."*), a split of authority existed between the Eleventh Circuit and decisions of the District of Columbia and Ninth Circuit respecting interpretation of the injury requirement component of Article III standing in equal protection cases. The Eleventh Circuit cases required plaintiff to show loss of a specific contract in order to prove standing. *See* discussion in *Northeastern Fla.*, at p. 2300, 2302.

In *Northeastern Fla.*, decided by this Court during the time the *Bras v. California Public Utilities Commission* case was on appeal, this Court held that it was not necessary to show that a contract would have been received "but for" the challenged ordinance in order for a person or entity to have standing to seek declaratory and injunctive relief:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury-in-fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier not the ultimate inability to obtain the benefit.

Northeastern Fla. at p. 2303.

In *Northeastern Fla.*, this Court reversed the decision of the Eleventh Circuit which had ordered dismissal of plaintiff's claims. The Supreme Court held that the association of contractors in that action had standing to challenge an ordinance that gave preferential treatment to certain minority-owned businesses.[6] There, the Association had not referred to any specific contract or a bid that was lost—only that its members regularly bid on contracts and they would have bid on contracts but for the restrictions of the ordinance.

Here, there was uncontradicted evidence that "but for" the 10 point preference given to architect WMBEs by Pacific

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[6] In fact, the original ordinance challenged by the Association plaintiff in *Northeastern Fla.* consisted of a set-aside of 10% of total dollars spent on city contracts in favor of women and seven different minority groups. That ordinance was repealed 22 days after the Supreme Court granted certiorari. Nonetheless, this Court found that plaintiff had standing to continue its challenge against the new ordinance. *See Northeastern Fla.*, 2300–2301.

Bell, Bras would not have been eliminated from consideration for entering into an "improved business partnership" with Pacific Bell. ER 126-130, 63-77, App. 46, App. 102-110 and Resp. App ___. (ER 128, 129 graphs not submitted with the Commission's Petition.) In addition, Bras' Declaration in Opposition to Summary Judgment which was made subsequent to his settlement with Pacific Bell, stated that:

> I earnestly desire to reinstate my long-term business relationship with Pacific Bell in the performance of architectural services to it in the future and stand ready, willing and able to provide such services should I be given an opportunity to do so.

(ER 57, App. 114.)

The Ninth Circuit Court of Appeals found that such declaration, along with a letters from Pacific Bell reiterating its pleasure with Bras' work and its intention to keep his information in their files for future consideration, was sufficient for purposes of summary judgment to show Bras would suffer future injury if the program was not enjoined. *See Bras v. California Public Utilities Commission, 59 F.3d at 874*, App. 12.

REASONS THAT THE PETITION SHOULD BE DENIED

A. The Previous Split Of Authority Between The Circuits Regarding The Test For Standing In Equal Protection Actions Has Already Been Resolved By This Court By Its 1993 *Northeastern Fla.* Decision.

As set forth above, this Court's opinion in *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. ___, 113 S.Ct. 2297 resolved a previous split of authority between the Eleventh Circuit and Ninth Circuit as to the "injury-in-fact" required for Article III standing in equal protection cases. The opinion by this Court in *Northeastern Fla.* upheld the standards recognized by the Ninth Circuit Court of Appeals in *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991) *cert. denied*, 502 U.S. 1033 (1992), and the District of Columbia in *O'Donnell Constr. Co. v. District of Columbia*, 295 U.S. App. D.C. 317 and reversed the Eleventh Circuit's test which found standing lacking for failure of plaintiff to allege that it would have received a contract but for the challenged ordinance. The Supreme Court's opinion in *Northeastern Fla.* was rendered on June 14, 1993 during the pendency of the appeal by Bras in the Ninth Circuit.

In fact, the Ninth Circuit's opinion in *Bras v. California Public Utilities Commission, 59 F.3d. 869* relied heavily on the resolution of the standing requirement set forth by this Court in *Northeastern Fla.* (*see* App. 11, App. 13–14, App. 15). The Ninth Circuit held that:

> Under *Northeastern Fla.*, Bras need only demonstrate that he is "able and ready" to bid on contracts and that a discriminatory policy

> prevents (him) from doing so on an equal basis.

Bras v. California Public Utilities Commission, 59 F.3d at 873 citing to *Northeastern Fla.* App. 11.

B. The Ninth Circuit Did Not Err In Its Limited Examination Of The Merits Of Bras' Claims In Order To Determine If Standing Existed.

The Commission argues that the Ninth Circuit exceeded its jurisdiction when it addressed the merits of Bras' claims. *See* Petitioner's Brief, (hereinafter referred to as "Pet. Brf.") p. 18. However, the Commission offers no legal authority whatsoever that an examination of the challenged WMBE Statute and the Commission's General Order 156 is inappropriate. Indeed, such a contention is absurd.

The question of whether a party has demonstrated a sufficient injury to litigate a constitutional claim necessarily involves a limited inquiry into the merits of plaintiff's claim to determine if the injury plaintiff asserts might stem from a violation of the constitutional guarantee. *Warth v. Seldin*, 422 U.S. 490, 500, 501 (1975).

As this Court's review of standing undertaken in *Northeastern Fla.* shows, it is necessary to review the facts and provisions of the particular ordinances or programs at issue in order to determine if plaintiff has alleged an injury that can be fairly "traceable" to the challenged action—the second requirement of Article III standing. *See, Northeastern Fla.*, 508 U.S. ___, 113 S.Ct. at 2301–2304; *Lujan v. Defenders of Wildlife*, 505 U.S. 555, 112 S.Ct. at 213–2136..

C. The Petition Improperly Contests The Factual Findings Of The Ninth Circuit, Which Court Was Required On Review Of Summary Judgment, To View The Evidence In The Light Most Favorable To Bras.

The Commission's petition consists almost entirely of protestations about the factual findings of the Ninth Circuit Court of Appeals. Certiorari is rarely granted for such asserted error(s). *See* Rules of the Supreme Court of the United States, adopted July 26, 1995, and effective October 2, 1995, Rule 10.

In addition, the Commission blatantly ignores the fact that the Ninth Circuit was required to review the evidence presented in the Bras appeal of a district court's summary judgment, in the light most favorable to Bras, the non-moving party. *See Bras v. California Public Utilities Commission*, 59 F.3d at 872, App. 8, citing to *First Pacific Bank v. Gilleran*, 40 F.3d 1023, 1024 (9th Cir. 1994). Therefore, findings of fact by the Ninth Circuit favorable to the evidence presented by Bras are not properly subjected to review by this Court on a petition for writ of certiorari.

D. There Is A Sufficient Causal Nexus Between The WMBE Statute, The Commission's General Order 156 And Bras' Past And Threatened Future Injury.

Since the provisions of both the WMBE Statute and the Commission's General Order are **mandatory** for all regulated utilities whose gross annual revenues exceed $25,000,000, a sufficient nexus has been established showing that the Statute and Order directly caused and will continue to cause Bras injury.

The case of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, (1992) does not defeat Bras' claim of standing because he has suffered a particularized injury that can effectively be redressed by a judicial decision. In this case, an order granting injunctive or declaratory relief to enjoin or abrogate the WMBE Statute and General Order 156 would provide immediate redress to Bras, as the utilities would no longer be bound to comply with the provisions of the Statute and Order requiring them to implement numerical "goals" for WMBEs in their selection of contractors and suppliers. Bras also alleged and proved he suffered a direct injury by the utilities implementation of the Commission's General Order 156 showing that this Court's previous decision in *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, [38–40], 44–45 (1976) also does not act to defeat Bras' standing to challenge the Commission's Order and the WMBE Statute. In addition, the Commission's proffered case of *Asarco v. Kadish*, 490 U.S. 605 (1989) is readily distinguishable. The Bras case is not a "taxpayer case."

Here, Bras has shown direct injury both past and threatened, caused by the provisions of the WMBE Statute and General Order 156 which compel the utilities to seek the minimum numerical "goals" for WMBE procurement as set by the Commission and conducted under its "oversight" responsibilities. (*See* Cal. Pub. Util. Code § 8283, App. 65–66 and General Order 156, §§ 1.1.1, 6.1, 8,9,10,11, App. 73, 79, 85–91.) In fact, the Commission even requires the utilities to evaluate its "employees with procurement responsibilities" "on the basis of their progress in meeting the goals of their specific area of procurement"! (General Order 156, §6.1.1, App. 79.) Accordingly, the nexus between Bras' injury and the WMBE Statute and Commission's General

Order 156 as imposed on the utilities is sufficient for purposes of Article III standing in this equal protection case.

E. The Petition Is Riddled With Misstatements Of The Facts And Evidence Before The Court.

Pursuant to Rules of the Supreme Court of the United States, adopted July 26, 1995, and effective October 2, 1995, Rule 15(2), a brief in opposition is required to address any perceived misstatement of fact or law. In this case, respondent Bras must report that the Commission's petition is riddled with several misstatements of the facts and evidence put before the court.

1. No "Bidding" was involved in the selection process at issue in the *Bras* Case.

In the "Questions Presented" portion of the Commission's petition, the Commission states that one of the questions presented by the *Bras v. California Public Utilities Commission* case is whether respondent has satisfied the injury-in-fact requirement "where respondent failed to demonstrate that the statute and implementing regulations impose a barrier to his placing a bid for an architectural public utility contract; ..." (Pet. Brf. p. i(1)(a).) However, the selection process involved in this case and the percentage WMBE "goals" for total procurement of utility contracting and service dollars set by General Order 156 do not necessarily involve a "bidding" process.

The Commission's argument that "the crux of Bras' claim is not that he did not have an equal opportunity to bid, but that he did not win a bid" (Pet. Brf. at p. 17) and its reference to (Pacific Bell's) Mr. Behuresht's alleged

deposition testimony "that even if the WMBE factor had been eliminated, Bras may not have won a bid" (Pet. Brf. at p. 17, fn. 7), is contradicted by the actual testimony submitted."

Even a cursory review of the deposition testimony of Mr. Behuresht, a portion of which is included in the Commission's appendix at App. 102–110, shows that the word "bid" was never used at all by Mr. Behuresht.

Rather, in this case, Bras was eliminated from consideration for selection by Pacific Bell from the potential of entering into an "improved business partnership" with the utility. ER 54–57, 63–77, App. 112–115 and Resp. App. 12–22. Bras is not able to allege that he "bids" on particular projects for Pacific Bell, but that for a period of over 20 years, he had regularly obtained contracts with Pacific Bell on a three-year period for performance of architectural work, (ER 55, App. 112.) and that he desired to provide services to Pacific Bell in the future and stood "ready, willing and able" to do so if given the opportunity. *See*, Bras Declaration, ER 55–57, App. 112–114.

The Ninth Circuit Court of Appeals found that despite the fact Bras could not (then) "bid" on future projects for Pacific Bell because Pacific Bell had already entered into long-term business relationships with the three other architects who had the most points on the Pacific Bell selection matrix (ER 128–129.) "Bras can, however, fill out a new qualification form when the three-year term of Pacific Bell's present business relationships expires." *Bras v. California Public Utilities Commission*, 59 F.3d at 873 (App. 11.) The Ninth Circuit expressly found that the fact that "Bras can only compete for long-term contracts every several years rather than on a

project-by-project basis does not change the (standing) analysis." *Bras v. California Public Utilities Commission*, 59 F.3d. at 873 (App. 11.) Indeed, to find otherwise would entirely prevent all persons who seek contractual relationships with the utilities which do not involve a "bidding" process from challenging the WMBE statute and General Order 156.

2. The Commission Materially Misstates The Provisions Of The Challenged Statute And Order.

In its petition, the Commission has even made material misstatements about the content of the challenged WMBE statute and its General Order 156. The WMBE statute and General Order 156 actually **require** the regulated utilities to set minimum WMBE procurement "goals" and submit reports concerning its progress in achieving its "goals" to the commission pursuant to the WMBE Statute and the Commission's General Order 156:

> (a) The commission shall require each electrical, gas, and telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000) and their Commission-regulated subsidiaries and affiliates, to submit annually, a detailed and verifiable plan for increasing women, minority and disabled veteran business enterprise procurement in all categories.
>
> (b) These annual plans shall include short- and long-term goals and timetables, but not quotas, and shall include methods for encouraging both prime contractors and

grantees to engage woman, minority, and disabled veteran business enterprises in subcontracts in all categories which provide subcontracting opportunities.

(c) The commission shall establish guidelines for all electrical, gas, and telephone corporations with gross annual revenues exceeding twenty-five million dollars ($25,000,000) ... to be utilized in establishing programs pursuant to this article.

(d) Every electrical, gas, and telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000) shall furnish an annual report to the Commission regarding the implementation of programs established pursuant to this article ...

(e) The commission shall provide a report to the Legislature on September 1 of each year, on the progress of activities undertaken by each electrical, gas and telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000) pursuant to this article and the implementation of woman, minority, and disabled veteran business enterprise development programs. ... California Public Utility Code Section 8283(a-e), App. 65–66.

The Commission's General Order 156 actually sets the numerical "goals" that are to be utilized by the utilities:

> 8. GOALS
>
> Each utility shall annually set substantial and verifiable short-term (one-year), mid-term (three-years) and long-term (five years) goals for utilization of WMBEs. Goals shall be set annually for each major product and service category which provides opportunities for procurement. "Substantial goals" means goals that are realistic and clearly demonstrate a utility's commitment to increase WMDVBE's share of the utility's purchases and contracts.
>
> ...
>
> 8.2 Each utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases from outside vendors of not less than 15% for minority owned business enterprises and not less than 5% for woman-owned business enterprises.
>
> ...
>
> 8.3 The specification of initial long-term goals in this section shall not prevent the utilities from seeking to reach parity with public agencies, which the Legislature found in Public Utilities Code Section 8281(b)(1)(B) are awarding 30% or more of their contracts to WMBEs.
>
> ...
>
> 8.8 Overall program goals shall be expressed as a percentage of total dollars

> awarded to outside vendors in all categories of products and services purchased by a utility other than products and services which fall within an excluded category established by the utility pursuant to Section 8.5, or which are included in a fuel procurement base established pursuant to Section 8.10.
>
> ...
>
> 8.12 Except for any penalty imposed as a result of a Commission-initiated investigation, no penalty shall be imposed for failure of any utility to meet and/or exceed goals.

General Order 156, App. 85–89.

As can be seen by a review of the WMBE statute (App. 62–68)and the Commission's General Order 156 (App. 69–91), which utilizes the words "shall," "at least," and "not less than" in the provisions advising the utilities of the numerical "goals" set by General Order 156 in implementing the WMBE statute, there is nothing voluntary about either the statute or the order. Even the Commission's own footnote (Pet. Brf. p. 2, fn. 2) admits that (prior to implementation of annual generic review proceedings), a utility's WMBE program was reviewed in its rate setting proceedings. In addition, based upon the Commission's brief and oral argument before the Ninth Circuit, the Ninth Circuit found that "the Commission concedes that it could sanction a utility by reducing its rate of return." *Bras v. California Public Utilities Commission*, 59 F.3d. at 872 (App. 8). Furthermore, the clear language of the Commission's General Order at section 8.12, shows that "although a utility cannot be automatically be sanctioned solely for failing to meet

goals, the Commission may, after conducting an investigation, sanction a utility for failing to make acceptable progress in the hiring of minority businesses." *Bras v. California Public Utilities Commission*, 59 F.3d. at 872 (App. 8), citing to General Order section 8.12.

3. The Petition refers to only a part of the evidence relied upon by the Ninth Circuit and fails to supply material evidence in its appendix.

However, the evidence provided by Bras in opposition to the Commission's summary judgment motion included much more material evidence than is produced in the Commission's appendix to its Petition. The Commission has not advised this Court that there were two letters from Pacific Bell that expressed Pacific Bell's satisfaction with Bras' previous work and which stated its intention to keep Bras' information in its files for future consideration. The first letter, dated July 26, 1991 is appended to the Commission's appendix as A-100. In that letter signed by Mr. Behuresht on behalf of M.J. Cochrane, Pacific Bell advises Bras that "I would like to assure you that your firm was very competitive and was not eliminated due to any unsatisfactory performance." (ER 119, App. 100, referenced in the Ninth Circuit's Opinion at App. 6.) However, the Commission has failed to append a copy of Mr. Behuresht's subsequent letter dated October 16, 1991 to Mr. Bras which was included within the evidence Bras submitted to the District Court, and in which Mr. Behuresht referred specifically to the requirements of the WMBE statute and General Order as it affected Pacific Bell:

> "as you noted in your letter, the criteria included an indication of a firm's M/WMBE status. In 1988, the California Public Utilities Commission adopted General Order 156 regarding utility purchasing from M/WBEs. **That order requires Pacific Bell to set goals for purchasing from M/WBEs of 15% of total purchasing dollars from minority-owned businesses and 5% from woman-owned businesses by 1993.**
>
> **Since your firm is not a minority- or woman-owned business, the criterion was "not applicable." It was, however, one of the criteria used in the selection process.** We ranked each firm with respect to the other criteria. However, since M/WBE status is either a yes or no question, we did not rank the firms in that area.
>
> As stated in Mr. Cochrane's July 26, 1991, letter, J. Jack Bras and Associates has provided valuable services to Pacific Bell in the past and was not eliminated due to any unsatisfactory performance. We appreciate your interest and will maintain your information on file for any future re-evaluation of our need for architectural services."

(ER 126–127, (emphasis added) Resp. App. 8.) However, as discovered by a review of Pacific Bell's "Supplier Pre-Qualification and Selection Weighting Criteria" (ER 130, App. 46), and two graphs of architect rankings not submitted

by the Commission in its appendix, ER 128–129, Bras was eliminated from consideration by Pacific Bell because he was unable to obtain the 10 points for the WMBE status. He therefore placed sixth in Pacific Bell's matrix rather than third as he would have been placed had no points been given for WMBE status. ER 128, 129. *See also* discussion by the Ninth Circuit of the evidence presented to it on the issue, *Bras v. California Public Utilities Commission*, 49 F.3d, at 871, 873–874, App. 5–6, 11–13, and Jack Behuresht's deposition testimony ER 63–77, Resp. App. 11–22.

Equally important, the Commission argues before this Court that the Ninth Circuit made erroneous presumptions regarding the WMBE statute, its General Order 156 and the implementation of the Order by the regulated utilities. However, the Commission fails to recognize that the Ninth Circuit was presented with the Commission's own orders interpreting General Order 156. (*See*, "Order Instituting Rulemaking," R.93-09-026 filed on September 17, 1993 and the Commission's own "Interim Opinion" dated August 3, 1994, of which Bras had requested the Ninth Circuit to take judicial notice and to which no opposition by the Commission was made.) (Supplied for this Court's reference as Resp. App. 23–45, and Resp. App. 46-65.)

CONCLUSION

In light of the foregoing facts and legal argument put before this Court, Respondent respectfully requests that the Court deny the Commission's Petition for Writ of Certiorari.

Respectfully submitted,

PAMELA A. LEWIS
Counsel of Record
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PROFESSIONAL CORPORATION
1676 N. California Blvd., Suite 200
Walnut Creek, California 94596
(510) 937-3600

No. 95-767

In The

Supreme Court of the United States

October Term, 1995

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,

Petitioner,

v.

J. JACK BRAS, individually, and doing business as J. JACK BRAS & ASSOCIATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S APPENDIX

PAMELA A. LEWIS
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LETTERHEAD OF J. JACK BRAS AND ASSOCIATES ARCHITECTS

February 4, 1991

Paula S. Knapp
Pacific Bell
2600 Camino Ramon, Room 3 E 200
San Ramon, Ca. 94583

SUBJECT: PRE-QUALIFICATION CRITERIA

Dear Ms. Knapp:

It is our pleasure to submit the enclosed Pre-Qualification Criteria form to you as requested.

We have provided professional architectural services to Pacific Bell since 1969, during which time we have successfully completed numerous projects ranging from equipment buildings to offices.

Our projects for Pacific Bell have always been done in a professional manner, completed on time, and within budget.

We hope that our past record speaks for itself, and we sincerely hope that you will continue to consider us as Architectural Consultants. We look forward to a continuing professional relationship with Pacific Bell.

Sincerely,

/s/ J. Jack Bras

J. Jack Bras

JJB:tt

Enc: Pre-Qualification Criteria form
Income Statement and Balance Sheet

LETTERHEAD OF J. JACK BRAS
AND ASSOCIATES ARCHITECTS

August 19, 1991

Mr. Jack Behuresht
Pacific Bell
2600 Camino Ramon, Room 3E001
San Ramon, Ca. 94583

Subject: Architectural Services

Dear Mr. Behuresht:

I appreciate your response to our letter of June 28, 1991 to Mr. Quigley.

I am pleased to know that Pacific Bell continues to recognize that my rates are very competitive and that my firm was not eliminated on the basis of unsatisfactory performance. However even such assurances does nothing but to deepen the mystery as to the criteria used in your process of reducing the number of architectural firms with whom Pacific Bell will do business. I would like to assume that such criteria is objective in nature. Since my firm has had no contact with anyone at Pacific Bell pertaining to your selection process, except for a single telephone call concerning our minority status, I can't help but believe that the "selection process" is fundamentally grounded upon racial considerations. This firm has never conducted its affairs in a racially discriminatory manner and we strenuously object to being removed from future consideration on the basis of an ethnic issue.

Lest I jump to an erroneous conclusion and in view of our long and successful relationship with Pacific Bell, I would appreciate meeting with your contracting managers. Would you also attend? I would dare to hope that, contrary to your letter, a final decision to eliminate me from further services at this time can be deferred pending our meeting and further evaluation.

Sincerely,

/s/ J. Jack Bras

J. Jack Bras

JJB:ha

cc: Phil Quigley
M.J. Cochrane

LETTERHEAD OF J. JACK BRAS AND ASSOCIATES ARCHITECTS

September 24, 1991

Mr. Jack Behuresht
Pacific Bell
2600 Camino Ramon, Room 3E001
San Ramon, Ca. 94583

RE: Architectural Services

Dear Mr. Behuresht:

Both Hugh Anton and myself want to follow-up and thank you for the opportunity of meeting with you, John Couch and Paula Knapp at your office on September 10, 1991. I am not sure what we really accomplished at that meeting although you did hand to me a two page document entitled "Selective Weighting Criteria of 13 Firms." Not having had a chance to review this during the course of the meeting, I thought I would take this opportunity to respond to the document as it purports to represent objective criteria in the selection of architects who would continue to perform services for Pacific Bell.

One of the threshold questions I have has to do with the identity of those individuals within Pacific Bell who did the ranking. I feel that only those with whom I have worked over the years should be judging my firm and I am not sure that

was the case here. Further, at our recent meeting I had some question as to how that criteria entitled "Quality of Past Performance" was really evaluated. At that time you refused to provide any information on this subject stating that was an "internal" process which would not be disclosed. I ask that you reconsider this position and advise me accordingly as to both questions.

I also have some question concerning the relevancy of several criteria such as the number of licensed architects in the firm, size of the organization and a rather narrow category entitled "1990 Expenditures." It seems to me that what matters here is performance, reliability and ability to work with other consultants as well as Pacific Bell field managers. In all these categories I feel I should rank very high.

An anomaly set forth in this document is a criteria entitled "MWBE Status" which apparently has to do with whether "any firm . . . . meets the official definition of a minority or woman owned business (i.e., at least 51% ownership)." That category is then labeled "not applicable." If that is the case why have the criteria listed at all. It leads me to conclude that while it may not be an official criteria it has nonetheless been utilized in the selection process.

I have been advised by counsel that reverse discrimination (e.g., racial discrimination against whites) is just as actionable under our various state and federal statutes as

racial discrimination against blacks, hispanics or any other racial group. It seems to me that you may be considering racial guidelines or some affirmative action program in making your selections. I have no objection to that as long as it is a lawful process. I am not sure what the PUC requires but that can be ascertained.

What I would expect from Pacific Bell is fair treatment. You said at the close of our meeting that you would get back to me. I eagerly await your response in that respect.

Very truly yours,

/s/ J. Jack Bras

J. Jack Bras
JJB/sn
cc: Phil Quigley
M.J. Cochrane

LETTERHEAD OF PACIFIC BELL

By Fax - Oct. 23, 1991
Hard copy in mail today to Mr. Bras

October 23, 1991

Mr. J. Jack Bras
J. Jack Bras and Associates
90 Mission Drive
Pleasanton, CA 94566

Plif	ExH 28
WITNESS	
DATE	10-15-92

Dear Mr. Bras:

Thank you for your letter dated September 24, 1991. As we agreed at our September 10th meeting, I have reviewed our recent selection process for architects. The package, entitled "Selected Weighting Criteria of 13 Firms", which we provided to you at our meeting lists and describes the criteria utilized by Pacific Bell to evaluate the competing firms. I am satisfied that our evaluation of the various firms based on these criteria was conducted in a fair and consistent manner. Let me reiterate our previous assurances that there was no intent to imply poor performance on the part of your firm. The group of competing firms included only those firms which have provided a high level of service to Pacific Bell. Given that fact, it was unavoidable that some very competent firms would not be ranked as high as others.

With respect to your concerns regarding the process utilized to evaluate the first criterion, "Quality of Past Performance", we asked our project managers to rate your firm's work over the past two years in the areas of cost, timeliness of performance, quality of performance, process and interaction. Only those Pacific Bell managers who have worked with your firm during that two-year period provided input. Those managers included Jose Albano, Mark Johnson, Anton Lonich, Lowell Marcus and Becky Smith.

As we discussed, the greatest weight was given to past performance, as indicated by its placement at the head of our criteria list. There were, however, other important criteria that did receive consideration. The number of licensed architects and the size of organization were considered in order to ensure that the firm could absorb what is anticipated to be an increased amount of business in some cases. I believe that the selected firms evidence the fact that smaller size did not place any firm at a great disadvantage. The category of "1990 Expenditures" was another area of consideration. The amount of work we awarded to any firm in the last two years is another indicator of the faith our field managers have in that firm.

As you noted in your letter, the criteria included an indication of a firm's M/WBE status. In 1988 the California Public Utilities Commission adopted General Order 156 regarding utility purchasing from M/WBEs. That Order requires Pacific Bell to set goals for purchasing from M/WBEs of 15% of

total purchasing dollars from minority-owned businesses and 5% from women-owned business by 1993.

Since your firm is not a minority- or woman-owned business, the criterion was "not applicable." It was, however, one of the criteria used in the selection process. We ranked each firm with respect to the other criteria. However, since M/WBE status is either a yes or no question, we did not rank the firms in that area.

As stated in Mr. Cochrane's July 26, 1991 letter, J. Jack Bras and Associates has provided valuable services to Pacific Bell in the past and was not eliminated due to any unsatisfactory performance. We appreciate your interest and will maintain your information on file for any future reevaluation of our need for architectural services.

Sincerely,

/s/ Jack Behuresht

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

J. JACK BRAS, individually and doing business as J. JACK BRAS & ASSOCIATES,

Plaintiff,

vs.

PACIFIC BELL, a Corporation, CALIFORNIA PUBLIC UTILITIES COMMISSION, PHILIP BREMOND in his representative capacity as MWDVBE Program Manager for the California Public Utilities Commission, NEAL SHULMAN in his representative capacity as Executive Director of the California Public Utilities Commission,

Defendants.

_____/

CONTINUED DEPOSITION OF JACK BEHURESHT

VOLUME II

Taken before DOREEN L. COVARELLI,

a Certified Shorthand Reporter

State of California

CSR No. 8039

October 16, 1992

Are you referring to the 13 firms?

MR. BERG: The 13 firms shown on that one matrix? We're looking at -- this is an exhibit here.

MR. GARVIN: On the 13 firms on the survey. Yes, it would be on that.

MR. BERG: Okay.

THE WITNESS: Primarily, yes. And the reason I will not limit it to 13 is because some firms maybe were invited, but did not participate, but fundamentally, the 13.

MR. GARVIN: Q. How did you determine that these 13 -- for the sake of our subject matter -- that all 13 firms had previously provided a high level of service to Pacific Bell?

A. Basically, the rating of field people and the fact that they were doing business with us. Typically, if the performance is not satisfactory, we cease to do business with the firm.

Q. So you made that determination by input, I guess, from your field people primarily?

A. Primarily.

Q. Did you make any independent determination? In other words, determination on your own apart from your input from the field people that these were good, quality firms?

A. Did I personally make?

Q. Yes.

A. No, I did not.

Q. Now, you yourself, I believe, testified that you knew personally only, I think, two firms?

A. That's correct.

Q. And that's Intergraph?

A. And Garcia/Wagner.

Q. And Garcia/Wagner. And so independent of that field input, did you just on your personal experience, did you conclude that at least those two were good, quality architectural firms?

A. I knew that they were good quality architectural firms.

Q. Now, you also concluded or assured Mr. Bras in that letter in the last paragraph page 2 of that letter, which is Exhibit 25 -- excuse me. Exhibit 28.

MR. BERG: Where, second page?

MR. GARVIN: Page 2, yeah, last page, last paragraph.

Q. You also assured Mr. Bras that he was not eliminated due to any unsatisfactory performance and my question is, did you draw that conclusion from looking at what counsel -- your counsel has referred to as the matrix or how did you arrive at that conclusion?

MR. BERG: Call it by exhibit name since we got it here.

MR. GARVIN: 12.

MR. BERG: Exhibit 12.

MR. GARVIN: Q. In other words, my broader question is how did you make that determination that Mr. Bras wasn't eliminated due to any unsatisfactory performance?

A. From the field input which was reflected on the matrix.

Q. In addition to the matrix, we have as part of -- in addition to the matrix, we have an Exhibit 16 through 24 -- Exhibit 16 through 23 what appear to be field input and I take it you did not rely on that in drawing your conclusion as to Mr. Bras?

MR. BERG: These pages (indicating).

THE WITNESS: I have not seen these pages before.

MR. GARVIN: Yeah, that's what he testified to before.

Q. You had not seen these pages before, had you?

A. No.

Q. Let's get over to Exhibit 12, what your counsel has referred to as the matrix entitled, "Bay Area Architects." I'm

sorry. I want to instead refer to Exhibit 11 entitled, "Manager's ratings."

Now, I seem to recall that this is a document that you hadn't seen before, either; is that correct?

A. Correct.

Q. I'm going to ask you even with having it before you now to perhaps assist me in some interpretation of it, if you can.

If you'll look at, for example, Intergraph, he was what you're asking, are you asking whether if he did the math basically on this matrix and subtracted the M/WBE points from those vendors who were given those points what would the rankings be? Is that what you're asking him on this matrix?

MR. GARVIN: That's another way of putting it.

THE WITNESS: From a purely math perspective, Intergraph would have had a score of 47.4 and Bras would have had a score of 48. a .6 difference.

MR. BERG: You mean -- you mixed two answers. You said a .6 difference. I think your answer will read 48.6.

THE REPORTER: I got it.

MR. GARVIN: Q. I hate to go through this again, but there is some confusion.

A. Sure.

Q. Correct me if I'm wrong, I think what you're telling me is that if you eliminate M/WBE as a factor here and subtract 10 points from the scores of Intergraph, that Mr. Bras would mathematically rate higher at 48.0 versus Intergraph at 47.4.

Is that a fair statement.

MR. BERG: Mathematically?

MR. GARVIN: Yes.

THE WITNESS: Yes.

MR. GARVIN: Q. On that mathematical basis, then, one would conclude, would one not, that Mr. Bras would rank No. 3 as to the overall 13 architects set forth in this matrix?

MR. BERG: Before you answer that, could you read the question back to me, please?

(Record read.)

MR. BERG: It's argumentative as to form, but otherwise, you can answer.

THE WITNESS: Mathematically, yes.

MR. GARVIN: Q. Now, was there some determination made at some point that you would -- "you" meaning Pacific Bell -- would complete this process by selecting the top three architectural firms?

MR. BERG: It's vague as to time.

MR. GARVIN: I said at the completion of this process.

MR. BERG: I know, but if you read your question, you're going to see it's vague as to when the decision was made.

MR. GARVIN: Q. Whenever it was made, at the end of the process you made a decision, did you not?

A. At the end of the process, we made a decision.

Q. And in this case, the decision was to award contracts to the three top firms, architectural firms, "the three top," meaning the three who scored the highest in this study?

A. No.

Q. What was your decision?

A. The decision was to engage the top three for a negotiation.

Q. I see. And had M/WBE -- strike that.

When you say "top three," you mean reduced the number from 13 to 3?

A. The -- well, the top three firms, Garcia/Wagner, Intergraph and Roja, they were subject of further review and negotiation because potentially, we may not have reached an agreement to go any further.

Q. I understand this is kind of a preliminary screening?

A. Correct. It was just a guide for us to go through successive steps.

Q. Now, getting back to Mr. Bras, had the M/WBE status been eliminated as a factor, he would have been or survived that preliminary screening and been within one of the three firms.

Is that a correct conclusion?

A. No, that is not a correct conclusion.

Q. Where am I wrong?

A. The way we look at it is we put emphasis on expense of central office work and also administrative work and one of the objectives would have been for us to ensure that we had more than one firm that could deliver these type of services.

On this particular scenario that you described, had Mr. Bras been the third firm, we would have been in a very awkward position of not having an architectural -- not having more than one architectural firm that was proficient on the administrative space design experience. And then there are other factors, as well.

Q. Let's take them one at a time, then.

Are you telling me that you would have some difficulty because Mr. Bras did not have the administrative design experience?

A. With Pacific?

Q. With Pacific. At least sufficient for your purposes?

A. Based on the ratings provided by the project field people.

Q. And I think you said that you'd only be left with one firm with that kind of experience had Bras been in that top three?

A. Correct.

Q. And what firm would that have been?

A. That was Garcia/Wagner.

Q. And with Intergraph, in fact, being within the top three, can you consider, "you" being Pacific Bell, that Intergraph had sufficient administrative design experience to satisfy your needs?

A. Based on the rating provided by the field people, yes.

Q. I take it by this rating in Exhibit 11, the matrix, Roja even had less administrative design experience than Mr. Bras?

MR. BERG: Excuse me. You misstated. I think you're talking about Exhibit 12.

Mr. GARVIN: I'm sorry. Exhibit 12. Did I say 11?

MR. BERG: Yes.

MR. GARVIN: Change that to 12.

MR. BERG: Now, can I hear the question again? What was the question, unless you want to say it again.

MR. GARVIN: I can say it again.

Q. Referring to Exhibit 12, as to the attribute of administrative design experience, you would conclude that Mr. Roja or the Roja firm even had less administrative design experience of Mr. Bras.

Is that a correct conclusion?

A. Based on the ratings, he received a 1 and Bras received 4.

Q. So was this data set forth in Exhibit 12 the only data on which you, Pacific Bell, relied on in making the preliminary cut, so to speak?

MR. BERG: Vague and ambiguous as to the word "preliminary cut."

MR. GARVIN: Q. I mean a cut from 13 to 3, which I was told was a preliminary matter.

A. Based on the analysis of the data, yes.

Q. Data set forth in 12, Exhibit 12?

A. Yes.

Q. Now, you'll notice referring to Exhibit 12 the top three firms mathematically speaking?

A. We did not pick the top three exclusively based on the mathematics. In other words, I look at the top three to ensure that the top three would provide the balance capabilities that we needed.

Q. And did you make that determination?

A. Yes, I did.

Q. So as it so happens in this case, mathematically the top three firms mathematically just happened to look good to you on balance after looking over the whole process?

MR. BERG: Objection. Argumentative as to form.

MR. GARVIN: Q. Is that true?

A. When I looked at the results, the top three firms appear to have a well balance of the capabilities we were looking for so that basically allowed us to then go to the next stop of beginning the dialogue on association with them.

Q. When you talk about the -- what did you call it, the qualities you were looking for --

Q. The capabilities.

Q. -- the capabilities you were looking for?

A. Right.

Q. Can you spell out these capabilities? In other words, are they spelled out here in the matrix or were there some other capabilities you were looking for other than what was considered in these attributes?

A. Primarily they are the attributes that are stated in the matrix, however, primarily that's what it is.

Q. Then you went on into negotiating or you had -- why don't you tell me what happened after that.

A. Well, this was a guide for this stage of the process. This would eventually identify certain ranking. We would analyze it, then we would decide who are the three firms, engage in further dialogue and provide us with additional data. they would have to review our contracts because we also change our contracts and so there was quite a bit of involvement that would take place subsequent to this and if, let's say, one of the firms would not prevail, we would have then gone back to the list, taken the next one and successive negotiation and eventually we could have arrived at a list of three.

Q. When you say you would take the next one, you mean the next one that scored highest mathematically?

A. The next one in a balanced way would compliment the ones that we had.

Q. I thought I saw a document of that process that occurred afterwards.

A. Sure. I --

Q. I guess what I'm looking for was there a letter that went to Garcia, Roja and Intergraph after this preliminary process ended, a letter inviting them

[END]

L/FNH/gab

Mailed
SEP 22 1993

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's own motion to revise General Order 156.	FILED PUBLIC UTILITIES COMMISSION SEPTEMBER 17, 1993 SAN FRANCISCO OFFICE R.93-09-026

ORDER INSTITUTING RULEMAKING

This Order Instituting Rulemaking (OIR) is being issued to consider revising General Order (GO) 156. GO 156 implements Public Utilities (PU) Code §§ 8281-8286, which mandates that the Commission require that those utilities with gross annual revenues exceeding $25 million, and their Commission-regulated subsidiaries and affiliates, seek to increase their procurement from women, minority, and service disabled veteran-owned business enterprises (WMDVBEs). Among other things, GO 156 sets goals of purchasing 20% of the products and services used by the utilities from WMDVBEs by the end of 1993 (15% for minority-owned business enterprises and 5% for women-owned business enterprises). GO 156 § 8.2.1,

adopted by Decision (D.) 93-06-041, provides that numerical goals for DVBEs will become effective in 1997.

GO 156 has been amended several times since 1988 when it was adopted by D.88-04-057. Certain of these amendments were made pursuant to various petitions for modification of D.88-04-057 in Rulemaking (R.) 87-02-026, while others were the product of three petitions for modification filed in R.91-02-011.

On May 26, 1993, the Commission convened a Full Panel Hearing (FPH) to inquire into the status of the WMDVBE program established under GO 156. We invited participants to address a number of issues with implications for the existing GO 156 program. Subsequently, in D.93-07-057, we stated that a new proceeding would be opened to address the issues explored at the FPH. In D.93-07-057 we also determined that a limited role remained for R.87-02-026 and that R.91-02-011 should be closed.

At the time that D.93-07-036 issued, one unresolved matter remained in R.87.02-026 and two in R.92-02-011. The sole issue pending in R.87-02-026 is the subject of two petitions for modification of D.90-12-027, filed by The Coalition to Help Advance Natural Gas and Energy Suppliers (CHANGES). The petitions seek elimination of the optional federal offshore and Canadian natural gas fuel exclusions authorized by GO 156 5§ 8.5 and 8.10.4.

We ordered that R.87-02-026 should be closed once the CHANGES petitions are resolved. Recently, on September

14, 1993, CHANGES filed a motion to dismiss its petitions; however, on the same day, Pacific Gas and Electric Company (PG&E) filed a petition for modification of D.92-12-027. PG&E's petition seeks the elimination of the Canadian natural gas fuel exclusion but not until November 1, 1994. These pleadings will be reviewed in R.87-02-026 and resolved in due course.

We also ordered that the two issues unresolved in R.91-02-011, GO 156 verification standards and scheduling of a proceeding for routine consideration of WMDVBE issues, be deferred to this new OIR where they may be considered in a fuller and more current context. We have included these issues in the questions posed in this OIR.

An OIR is the correct forum to make a decision on the revision of the existing GO. This OIR lists questions that are fundamental to our consideration of any revision of the existing rule. The utilities subject to GO 156 are made respondents and will be required to file answers to the questions set forth in this OIR. Other interested persons and entities are invited, but not obligated, to file answers to any or all of these questions. We desire to obtain the benefit of broad input and will direct the Executive Director to mail this OIR to those persons and entities who have indicated an interest in participating in further refinement of GO 156, including those who participated in, and/or submitted comments on, the FPH we held May 26, 1993.

Once we have received comments, we will assess them and order workshops, alternative dispute resolution processes and/or evidentiary hearings, as appropriate, to resolve contested issues before any revisions to GO 156 are proposed. Any changes ultimately proposed will be mailed for comment to all on the service list established in accordance with this proceeding before we make a final decision.

In the following sections, we briefly summarize the broad areas we intend to focus on in this OIR and then list the specific questions we wish answered.

I. AB 486

Assembly Bill (AB) 486, which became effective January 1, 1993, amended the California Public Contract Code to create a new framework for the certification of women, minority, and disadvantaged business enterprises by state and local agencies. Although AB 486 does not apply to utilities, it has caused us to reevaluate our policies and procedures for verification of WMBEs seeking to do business with utilities.[1] At present, the California Department of Transportation (CalTrans) and a number of other state and local agencies have procedures for verifying the minority or woman-owned status of business enterprises. AB 486 requires each state agency which performs verifications to accept verifications

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[1] DVBEs are verified by the State Office of Small and Minority Business and not by the GO 156 Clearinghouse.

performed by other agencies which use certain federal Small Business Administration verification standards. AB 486 also requires CalTrans to maintain a WMBE data base which is available to other agencies and the public.

Our WMBE program uses minority definitions and verification standards and procedures which are different than those in AB 486.2 A number of utilities have recommended that we replace the GO 156 minority definition and our verification standards with those in AB 486, and that we require utilities to accept verifications from any agency using the AB 486 standards. This recommendation raises the following questions:

A. Policy Considerations

1. Should the Commission be concerned that the use of the basic AB 486 verification standards by different agencies may result in differing conclusions regarding the eligibility of specific firms for participation in WMDVBE programs? If so, what specific steps could be taken to resolve this concern?

2. Should the Commission be concerned that the incorporation of AB 486 verification standards and procedures into the Commission's GO 156 program would, at

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[2] The Commission's minority definitions and the outline of its verification program is set forth in GO 156. The verification standards used by the GO 156 Clearinghouse operator under contract with the Commission are set forth in appendices to that contract.

least in the short term, reduce the standardization achieved by the Commission's current verification process?

3. Would incorporation of AB 486 verification standards tend to increase or reduce the possibility that "fronts" would be verified as WMBEs?

4. One of the criticisms of the current GO 156 verification process is that it is essentially duplicative of other, existing governmental certification programs. Some suppliers argue that it is time-consuming and costly to seek verification from multiple agencies.

a. If the Commission decides to adopt an AB 486 definition of "minority" and the AB 486 verification standards and procedures, is there any reason why the Commission should maintain a separate clearinghouse to verify businesses wishing to contract with utilities?

b. Is there any evidence that other agencies which verify WMBEs might be unwilling to perform verification analyses of businesses seeking to provide highly specialized products or services to utilities?

c. How likely is it that a business enterprise seeking to do business with utilities would, in the absence of the GO 156 Clearinghouse, be unable to locate an agency willing to perform a verification analysis?

d. If AB 486 is incorporated in the GO 156 program, would the benefits of a separate utility-specific Clearinghouse outweigh its cost?

e. If you believe a separate utility-specific Clearinghouse should be maintained, how should it be funded?

B. Technical Issues To Be Considered If The Commission Retains The GO 156 Clearinghouse And Incorporates Elements Of AB 486 Into GO 156.

1. Both of the AB 486 definitions of "minority' cited, respectively, in Public Contracts Code §§ 2051(c) and 10115.1(d), include within the definitions "any other group of natural persons identified as minorities in the respective project specifications of an awarding department or participating local agency." Would the adoption of such an open-ended definition make it difficult for the Commission or the utilities to administer GO 156?

2. If the Commission were to adopt an AB 486 approach for utility procurement programs, how would the verification criteria currently used by the GO 156 Clearinghouse have to be changed?

C. Technical Issues To Be Considered If The Commission Retains The GO 156 Clearinghouse And Does Not Incorporate Benefits of AB 486.

1. Should the minority definitions in GO 156 be amended? Some have expressed the opinion that the GO 156 § 1.3.8 definition of Asian Pacific Americans is ambiguous with regard to the status of those with origins in Iran, Iraq,

Lebanon, Afghanistan, and other countries not specifically listed.

2. Should GO 156 be amended to streamline the triennial reverification process required by GO 156 § 2.1.3? Could this be done without sacrificing verification quality?

II. GOALS

GO 156 § 8.2 currently requires each utility to establish initial minimum long term goals for each major category of products and services the utility purchases from outside suppliers. The established goals are not less than 15% for minority-owned business enterprises and not less than 5% for women-owned business enterprises.

GO 156 § 8.4 currently requires that utilities establish goals for minority women-owned business enterprises and non-minority women-owned business enterprises. These goals are to be a subset of the overall WMBE goals established under GO 156 § 8.2, and are intended to ensure that utilities do not direct their WMBE procurement efforts toward non-minority women and minority men-owned business enterprises to the detriment or exclusion of minority women-owned business enterprises.

In response to a question we posed in connection with the recent FPH, a number of utilities expressed the opinion that the current minimum goals should not be changed until after a study of the availability of minority and women-owned business enterprises. Most utilities also recommended that we

refrain from adopting specific goals for minority women until an availability study has been prepared.

Certain WMBE suppliers and advocates recommended that the goals be increased. Some suggested that the goals be based on WMBE availability, while others favored a more broad brush approach. Some recommended that we, ourselves, adopt a minimum goal for procurement from minority women-owned business enterprises.

GO 156 does not bar utilities from setting goals in excess of the initial minimum long term goals set forth in § 8.2. Indeed, GO 156 § 8.3 states that the specification of initial long term goals shall not prevent utilities from seeking parity with public agencies. (In PU Code § 8281 (b) (l) (B) the Legislature found that public agencies are awarding 30% or more of their contracts to WMBEs.) Therefore, WMBE suppliers and advocacy groups are already free to seek to persuade individual utilities to voluntarily increase their WMBE goals. Our approval is not necessary.

Before we could amend GO 156 to require utilities to set higher long term goals, we would need to establish on the record a rational basis for doing so. Obviously, detailed supplier availability studies such as those described in Croson[3] and its progeny could form the basis for new goals. We do not reject the possibility that other bases for new goals could also be presented.

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[3] City of Richmond v. J.A. Croson (1989) 488 U.S. 469.

A. Overall WMBE Goals

1. Are you aware of any current, statewide, regional, or local WMBE availability studies which have been prepared and could be reviewed in this proceeding?

a. If so, please either provide them as an attachment to your response to these questions or describe them in as much detail as possible. Please state whether you believe an evidentiary hearing is necessary for the presentation of such studies.

b. If not, please state whether you are aware of any studies currently underway, which may be available in the relatively near future.

2. If you believe that the GO 156 minimum long term goals should be changed, but are not aware of any availability studies currently completed or underway, what other evidence do you believe is available to justify new WMBE goals?

a. If such evidence is available in written form, please either attach the written material to your response to these questions, or describe the evidence in detail.

b. Please state whether you believe that an evidentiary hearing is necessary for the presentation of this evidence.

3. If you do not believe that the goals should be changed in the absence of current availability studies, and do not believe such statewide, regional, or local studies are

underway, please describe with as much clarity as possible the exact nature, scope, details, and estimated cost of the type of study you believe would be necessary to justify changing the goals in GO 156.

4. How would reliance on availability studies affect the scope of the goals? Would the goals have to apply only to minorities found to be available?

B. Minority Women Goals

1. Should the Commission itself adopt a separate goal for procurement from minority women-owned business enterprises?

a. If so, should the Commission wait to do so until a study of the availability of minority women-owned business enterprises has been performed?

b. If you believe the Commission should adopt a goal for minority women-owned businesses prior to the completion of an availability study, what specific goal do you recommend?

i. What evidence do you suggest the Commission rely on as the basis for the numerical goal?

ii. If you have no specific recommendation or do not have a specific evidentiary basis for your recommendation, what do you suggest the Commission rely on as a basis for a minority women business enterprise goal?

c. If you are a utility, what is the current goal for procurement from minority women-owned business

enterprises you established in compliance with GO 156 § 8.4?

i. What was the basis for this goal?

ii. How does your actual procurement from minority women-owned business enterprises compare with your goal?

2. If you do not believe the Commission should establish a goal for procurement from minority women-owned business enterprises, please explain whether you believe utilities are making adequate progress in increasing procurement from such business enterprises.

III. OUTREACH

During the FPH, several organizations and individuals proposed that we amend GO 156 to incorporate, at least informally, programs designed to provide WMDVBEs with various types of technical or economic assistance. These proposals included utility-WMDVBE partnerships, joint ventures, mentoring relationships, loan pools, insurance and bond arrangements, set-asides, and other technical and economic assistance.

GO 156 does not currently require or authorize utilities to engage in outreach programs which include utility-WMBE partnerships, joint ventures, mentoring, loan pools, insurance arrangements, pension, and bonding arrangements and/or other technical or economic assistance. (See GO 156 §§ 6.2 and 6.3.) Under current law, to the extent that we were to

mandate programs which favor WMBEs over non-minority-owned businesses, we might be susceptible to charges of discrimination against non-minorities unless we could demonstrate that the programs were narrowly tailored to remedy past discrimination. We have in the past noted that GO 156 does not include any set asides or bid preferences, and have censured a utility for excluding a business from a bidding opportunity solely on the basis of the race of the owners. (See Muse, Cordero, Chen, Inc. v. Pacific Bell (1990) 38 Cal.P.U.C. 5; Re Public Utilities Code Sections 8281 to 8285 Relating to Women and Minority Business Enterprises (1990) 38 Cal.P.U.C. 2d 384, 394.)

Thus far, the Commission has not conducted an availability study designed to meet the requirements of Croson and its progeny, although it has over the years developed a substantial body of evidence showing that minority and women-owned business enterprises have in the past received a share of utility contracts which is disproportionately low in relationship to their representation in the supplier community. Since GO 156 does not provide set asides or bid preferences, or preclude any race from bidding on any utility contract, no Croson study is necessary to support the Commission's current program. However, if the Commission were to adopt a program which permitted businesses owned by persons of certain racial origins to receive from utilities tangible financial or technical advantages not available to members of all races, under

current law it would need to establish the proper legal foundation for such a program (e.g., a Croson study).[4]

A. Policy Issues

We are interested in exploring whether there is a rational and lawful basis for amending GO 156 to require or authorize utilities to provide technical or economic assistance to WMDVBEs.

1. To what extent are the problems WMDVBEs face in doing or seeking to do business with utilities the same as the problems similarly situated non-minority businesses face in doing or seeking to do business with utilities? To what extent do WMDVBEs face problems not faced by similarly situated non-minority businesses? Please be as specific as possible.

2. What mechanisms are, or should be, in place to ensure that WMDVBEs with contracts with utilities are treated the same as other businesses providing similar products or services to those utilities?

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[4] State programs which provide benefits or limit opportunities based on race or national origin are subject to strict scrutiny, but are not entirely prohibited. (Croson, supra.) Such classifications may be permissible if they are narrowly tailored to meet a compelling interest such as remedying identified discrimination within the state's jurisdiction. (Id., 509.) A significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or its prime contractors, an inference of discriminatory exclusion could arise. (Id.)

3. Should the Commission amend GO 156 to require or authorize utilities to implement programs which provide WMDVBEs with technical and/or economic assistance not available to similarly situated non-minority businesses? If so:

a. What programs do you recommend?

b. Why do you recommend these programs?

c. Do you believe these programs should be required, or simply authorized?

d. How would you reconcile your recommendation with the requirements of Croson and similar judicial decisions?

4. Should such programs be available only to entities which are "disadvantaged" businesses enterprises, rather than all WMDVBEs?

5. Should the Commission amend GO 156 to require utilities to implement race-neutral technical and or economic assistance to all small and/or disadvantaged businesses seeking to do or doing business with utilities? If so:

a. What programs do you recommend?

b. Why do you recommend these programs?

c. Do you believe these programs should be required, or simply authorized?

B. Croson Study

A study regarding the contracting experience of WMDVBEs able to provide products or services to utilities in California could help us determine whether there is a lawful and rational basis for requiring or authorizing utilities to provide preferential technical or economic assistance to WMDVBEs. Such a study may also be helpful with regard to setting future WMDVBE goals. We are interested in exploring how such a study could be most effectively and expeditiously conducted.

a. Please describe with as much clarity as possible the exact nature, scope, elements, and estimated cost of the type of Croson study you believe would be necessary to justify requiring or authorizing utilities to provide preferential technical or economic assistance to WMDVBEs.

b. Are you aware of any statewide, regional, or local WMDVBE studies currently available, or soon to be available, which might supply information useful for a Croson review? If so, please either provide them as an attachment to your response or describe them in as much detail as possible.

IV. COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT

Although state law does not currently require us to add the class of disabled persons to our WMDVBE program, some participants at the FPH argued we should. We are

aware of the recently enacted Americans with Disabilities Act (42 USC §§ 12101-12213) and believe it is appropriate to consider including business enterprises owned by this class in GO 156. Consequently, please comment on the following:

1. Should the Commission amend GO 156 to include businesses owned and operated by Americans with disabilities, as defined in the Americans with Disabilities Act?

2. If so, should the Commission use GO 156 provisions regarding service disabled veteran businesses as a model?

3. More particularly, what provisions would be necessary in order to allow the Commission to effectively oversee and assist in the development of a utility program to encourage procurement from business enterprises owned by disabled persons?

4. If the WMDVBE program is expanded, in the absence of an initial numerical goal for procurement with business enterprises owned by disabled persons, should the Commission amend GO 156 §9 to require utilities to report more frequently than once a year on their progress in implementing the new program? Should such an amendment also apply to DVBEs?

V. ADDITIONAL ISSUES

A. Reporting Procurement from WMDVBE Brokers/Distributors

We recognize that GO 156 currently permits utilities to report 100% of the dollars paid to a WMDVBE even where the WMDVBE itself simply performs a brokerage or distribution function and receives only a commission or brokerage fee. Critics of our current approach claim that it does not accurately reflect the ultimate distribution of utility contract dollars between WMDVBEs and non-minority businesses. Section 23.47 of Part 23 of Title 49 of the Code of Federal Regulations (CFR) sets forth federal Department of Transportation regulations specifying that the percentage of contract dollars paid to a WBE, MBE, or disadvantaged business enterprise (DBE) which can be counted toward procurement goals varies with the nature of the business' operations. For example, 100% of expenditures for materials and supplies required under a contract and obtained from an WBE, MBE, or DBE manufacturer may be counted, but only 60% of expenditures with WBEs, MBEs, or DBEs which are regular dealers. (49 CFR § 23.47 (e) (l).)

Although the federal approach is somewhat more complex than the approach taken in GO 156, we are not aware that the federal Department of Transportation has had any trouble implementing § 23.47. Moreover, the adoption of a § 23.47 approach would also create greater consistency between the GO 156 program and the federal program.

1. Should the Commission adopt a reporting requirement similar to that in 49 CFR § 23.47? Please describe the benefits and/or burdens of such an approach.

2. Please also state whether you have participated in any contracts subject to these federal regulations, and, if so, briefly describe your experience.

B. Reporting Procurement From WMDVBE Utilities

Pursuant to GO 156 §8.9, utilities may exclude payments made to other utilities from the procurement base used to establish the goals and measure progress toward them.

1. Should GO 156 be amended to authorize utilities to count purchases from utilities which are themselves WMDVBEs (e.g. public utility providers of cellular telephone service) toward the overall procurement goals?

2. If so, could this be accomplished without eliminating the GO 156 § 8.9 option for utilities to exclude purchases from other utilities from their overall procurement base?

C. Reporting Procurement From WMDVBE Subcontractors

Certain utilities have proposed that utilities be allowed to record in their subcontracting results a percentage of purchases from prime contractors who claim to purchase a percentage of their own purchases from WMDVBE subcontractors, without proof that the subcontractors have

been verified by the GO 156 Clearinghouse. Other parties have suggested other modifications of the GO 156 subcontracting program.

1. Should the subcontracting provisions of GO 156 be amended to permit reporting subcontracts on a percent of purchase basis in appropriate circumstances?

2. If so, could a percent of purchase approach be reconciled with the GO 156 § 6.3.9 requirement that utilities only count subcontracts with WMBEs verified by the GO 156 Clearinghouse?

3. What impact would reliance on a Croson availability study as a basis for goals have on the utilities' ability to report subcontracts with out-of-state suppliers?

4. Do you have any other recommendations regarding the GO 156 subcontracting program?

D. Scheduling of Future, Routine WMDVBE Proceedings

D.93-07-057 deferred to this OIR the issue of what schedule we should impose for an annual, generic WMDVBE proceeding. This issue, which was posed but not addressed in R.91-02-011, stems from our determination, in D.89-08-026, that issues of utility program cost recovery should be removed from utility-specific general rate cases and addressed in an annual proceeding.

1. Does good reason still exist to establish a proceeding for generic review and authorization of routine funding of the utilities' internal WMDVBE program costs or should such review be returned to each utility's general rate case? Please discuss the implications of your answer for those telecommunications utilities subject to the New Regulatory Framework and those telecommunications and energy utilities which are not.

2. Should GO 156 be amended to establish the applicable proceeding for review and authorization of the utilities' internal program costs?

VI. CONCLUSION

We have reviewed the transcript of the FPH and the comments submitted and have attempted to-compile a comprehensive, yet manageable, list of questions. To the extent interested parties believe we have failed to adequately address an issue or have not identified it at all, we welcome focused discussion of that issue. Comments shall be filed in this docket 60 days from the date we issue this OIR and reply comments shall be filed 30 days after the-initial comments.

IT IS ORDERED that:

1. A rulemaking proceeding on the Commission's own motion is instituted to solicit comments and recommendations on a proposed revision to the Commission's General Order **(GO) 156.**

2. All utilities subject to GO 156 are made respondents in this proceeding. All respondents are required, and interested parties are invited, to respond to the questions listed above and, in general, to the subject matter of this proceeding.

3. An original and 12 copies of all comments shall be filed as a pleading with the Commission's Docket Office at 505 Van Ness Avenue, Room 2001, San Francisco, California 94102, within 60 days of the issuance of this order. Two additional copies shall be mailed to the Women, Minority and Service Disabled Veteran Business Enterprise Program Staff of the Commission's Executive Division. Within 30 days of the date comments are due, the Commission's Process Office shall compile and serve a service list which includes the names and addresses of all parties who have filed comments. Each commenting party is required to serve its comments on other parties upon request. Reply comments shall be filed in the same manner as initial comments and shall be due 30 days after initial comments are filed.

4. If, after reviewing the initial comments filed in this rulemaking, the Commission determines that workshops, evidentiary hearings, or alternative dispute resolution proceedings are necessary to resolve contested issues or clarify issues under consideration, such proceedings will be scheduled by the Commission's Administrative Law Judge Division and/or the Women, Minority, and Service Disabled

Veteran Business Enterprise Program Staff of the Commission's Executive Division.

5. The Executive Director is directed to mail a copy of this order to all utilities subject to GO 156; to those on the master service list for Investigation 90-02-044, Rulemaking 87-02-026, and Rulemaking 91-02-011; to State government agencies responsible for developing and maintaining data bases of verified or certified Women, Minority, and Service Disabled Veteran Business Enterprises; and to all persons who participated at the Full Panel Hearing we held on May 26, 1993 or submitted written pre- or post-hearing comments.

This order is effective today.

Dated September 17, 1993, at San Francisco, California.

DANIEL Wm. FESSLER
President
PATRICIA M. ECKERT
NORMAN D. SHUMWAY
P. GREGORY CONLON
Commissioners

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's own motion to revise General Order 156.	R.93-09-026 (Filed September 17, 1993)

INTERIM OPINION

On September 17, 1993, the Commission issued an Order Instituting Rulemaking (OIR) in this docket to consider revising General Order (GO) 156 to better address issues related to Women/Minority/Disabled Veterans Business Enterprises (WMDVBE) in light of experience gained in the administration of this program over the years.

In the OIR, we set forth a number of questions concerning such diverse matters as the application of Assembly Bill (AB) 486, continued maintenance of a utility-specific clearinghouse, goals, outreach, compliance with the Americans with Disabilities Act (42 U.S.C. Sections 12101-12213), reporting procurement results, and scheduling of future routine WMDVBE proceedings. We solicited

responses and comments on those questions from a broadbased group of utilities, women-owned and operated businesses, minority business enterprises, disabled veterans and veterans organizations, governmental agencies, and others having interest this subject. Response to the OIR was very encouraging, and a number of comments and reply comments, as well as suggestions, were received.

Review of the responses received demonstrates a clear need for the Commission to make certain policy determinations before we may proceed further toward the resolution of many of the issues raised in this proceeding. The policy determinations which. we today adopt and which are set forth below, are supported by the record, and, we feel, are necessary to the continued viability of the WMDVBE program.

AB 486 and Related Clearinghouse Issues

In 1988, legislation was enacted to create a program to provide women and minority owned businesses with an opportunity to compete in utilities' procurement of goods and services. In order to comply with this mandate and to ensure that utilities were doing business with bona fide women and minority business enterprises (WMBEs), a clearinghouse was established for the purpose of verifying the status of vendors claiming women or minority status.[5] Currently, the

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[5] In 1991, the Legislature added Disabled Veterans Business Enterprises (DVBEs) to the WMBE program. However, because the Department of General Services, Office of Small and Minority Business has been

Commission contracts with an independent commercial firm, Cordoba Corporation, to operate our clearinghouse.

Over the years, other governmental agencies have created similar programs designed and intended to ensure that vendors who apply to do business with them have bona fide women and minority owners. In response to this proliferation of potentially redundant programs, the Legislature enacted Assembly Bill (AB) 486, effective January 1, 1993, specifically to effect "one-stop shopping" with uniform, reciprocal, integrated standards to govern procurement by state agencies from WMBE vendors.[6]

In the OIR we asked the question whether it made sense that WMBEs should face different verification/certification requirements depending upon whether they were contracting with state agencies or public utilities. After a review of comments received, we are compelled to answer that question in the negative. The comments collectively indicate that there i8 no good reason to believe that the use of AB 486 criteria by various state agencies will result in significantly different determinations of WMBE eligibility by those agencies; rather, the comments uniformly assert that standardization of verification will be increased, not reduced.

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delegated the task of certifying vendors who fall within this category, DVBEs are not certified by the clearinghouse.

[6] AB 486 amends 5§ 2050 et seq of the Public Contract Code (Pub Contract Code).

Likewise, most comments argue, the commission's WMBE program would not be weakened by adoption of AB 486 certification ; criteria and accordingly, the majority support replacing the GO 156 verification standards with the certification provisions of AB 486. The majority of commentators are of the view that-from both a practical and financial point of view, the standards by which WMBE status is determined and verified should, to the maximum extent possible, be universal for all programs sponsored-or administered r by California's state agencies.

We are persuaded that uniformity of certification/ verification standards has merit and we wish to conform GO 156 with the requirements of AB 486. However, before we can devise appropriate modifications to § 2 of the GO (which governs verification) we must consider a related question-posed in the OIR--whether a utility-specific clearinghouse should be maintained under the GO 156 program?

Specifically, we asked whether the maintenance of a : utility-specific clearinghouse is duplicative of other governmental certification programs and is excessively time consuming and costly. The comments which respond to this question are not unanimous. For example, of the seven large utilities, some (Southern California Edison Company (Edison), San Diego Gas & Electric Company (SDG&E)) favor-abandonment of the clearinghouse; ; others (AT&T Communications of California (AT&T), GTE California Incorporated, Pacific Gas and Electric Company, Southern

California Gas Company) support retention of a "streamlined" version (which they do not define); and one other utility (Pacific Bell) suggests that the matter should be "researched".[7]

One potential solution to this uncertainty may be found in AB 486, itself. AB 486 specifically recognizes the California Department of Transportation (Caltrans) as the agency responsible for establishing and administering a computerized databank of certified WMBEs (Pub Contract Code § 2056) and provides that the certification criteria utilized by Caltrans are the same as those found under Part 23 of Title 49 of the Code of Federal Regulations (Pub Contract Code § 2052(a)).

A logical extension of the move toward "one-stop shopping," with its concomitant aims of reducing duplicative, overlapping governmental functions and eliminating the associated, unnecessary expenditure of time and capital by the private sector, suggests that we explore whether the GO 156 program might use the Caltrans databank as the central database of certified WMBEs.

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[7] The comments of those utilities which oppose retention of the clearinghouse are forceful. SDG&E, lists seven perceived benefits and stresses the reduction in cost and greater convenience for all concerned. (Comments, pp. 2-3.) Edison states, "The products or services Edison procures from its vendors are generally not specialized or customized for utilities, but are the same sorts of products and services which are contracted for by state agencies" and concludes, "Edison does not believe there is a need for a separate utility-specific clearinghouse." (Comments, pp. A-3 A-4.)

We see another potential benefit of using the Caltrans database. Not mentioned in the OIR, but relevant to this discussion, is Senate Bill (SB) 551, recently added to the Public Utilities (PU) Code as § 324.5. The statute requires the Commission to publish its WMBE database both electronically and in hardcopy form. This mandate dovetails with AB 486, which requires that the Commission make publicly available in limited form any database it uses for its own procurement (such as the clearinghouse database). These dual publication requirements could be met easily, at greatly reduced expense,-were we to adopt the Caltrans databank for our WMBE program and for our own procurement needs. Under such circumstances, we could comply with both statutes through use of the "Disadvantaged Business Enterprises Electronic Information Bulletin Board Service" (DBE/BBS), also known as "Calcert." This service allows anyone who has access to ascertain the status of a vendor, or obtain a listing, by Standard Industrial Classification type codes. Caltrans' DBE/BBS is presently in operation and free of charge.

In light of all the foregoing, we will direct that our WMDVBE program staff conduct a study to determine the comparability of the Caltrans program to our GO 156 program-and the feasibility of using the Caltrans databank as our program moves forward.

Among the issues we wish staff to investigate are both the initial and ongoing certification procedures used by Caltrans, including timeliness of processing, and the relative

ease by which the end-user may obtain information about potential vendors (we want to know how "user friendly" the Caltrans databank is compared to the existing clearinghouse database). Staff should also investigate how we would accomplish a transfer of the clearinghouse database to Caltrans, should we ultimately determine to pursue this course of action.

We direct that the report be filed in this docket within 60 days of the effective date of this order. We will not require staff to serve the report on the extensive service list; instead we will direct staff to serve only the respondent investor-owned utilities and all other parties which specifically request a copy of the report. Requests shall be made directly to Philip H. Bremond, the Manager of the Commission's WMDVBE program, Room 2006, within 45 days of the effective date of this order.

As noted in footnote 1 hereto, the task of verifying the status of Disabled Veteran Business Enterprises (DVBEs) has been delegated to the Department of General Services, Office of Small and Minority Business. The standards and guidelines established by that Office will continue to be utilized by the Commission and the utilities as verification of the status of DVBEs and no change is intended by this order.

Goals

In the OIR we asked a number of questions designed to elicit respondents' views about whether the GO 156 goals for utility procurement with WMBEs should be increased, and if

yes, how. Existing goals encourage procurement levels of at least 15% from minority owned businesses and at least 5% from women owned businesses. Individual goals for DVBEs have yet to be established.[8] We noted that:

> "GO 156 does not bar utilities from setting goals in excess of the initial minimum long term goals set forth in § 8.2. Indeed, GO 156 § 8.3 states that the specification of initial long term goals shall not prevent utilities from seeking parity with public agencies."
> (R.93-09-026 at p. 6.)

We also cited the legislative finding, contained within PU Code § 8281 (b)(l)(B), that public agencies' awards to WMDVBEs were as high as 30% of all contracts awarded by such agencies. Further, we reminded all parties that our approval is not necessary for the utilities to voluntarily increase their WMBE goals.

Regrettably, the comments do not signal unanimous utility | inclination to move beyond legislatively urged performance. Among the seven largest utilities, all but

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[8] Pursuant to Decision (D.) 93-06-041, which adopted an-all party settlement, utility procurement with DVBEs should increase on a good faith, best efforts basis through 1997, when (yet unestablished) numerical goals are to be identified. For this reason, our OIR does not raise as an issue the subject of DVBE goals. No party should infer from this "silence" that we are not committed to seeing DVBE procurement evolve, in the very near term, into a successful part of the overall GO 156 program.

Edison and AT&T recommend an availability study before any changes are made to the present goals. Many of the proponents of such a study mention, approvingly, that SB 718, enacted in 1991, requested the University of California to conduct a statewide availability study and that t the Final Report of the Assembly Commission on Emerging Business Enterprise Procurement recently added its endorsement to such a plan.[9] What these commentators fail to acknowledge, however, is that funding for such a study would be costly and no monies have been authorized by the legislature.

Edison rejects an availability study on several grounds, asserting that it is both unnecessary for a goal-based program such as the GO 156 program and "generally they do not have sufficient value to warrant performing them." (Comments, p. A-8.) -AT&T also discourages us from pursuing an availability study. (Comments, p. 9.)

Public Advocates, Inc. (Public Advocates), on behalf of a consortium of minority business entities, makes the same points though in much greater detail. (See generally, Reply Comments.) Public Advocates distinguishes the GO 156

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[9] The Assembly Commission on Emerging Business Enterprise Procurement (EBE Commission) was established in January 1992 by Assembly Resolution 30. Its directive was to review the experience of Emerging Business Enterprises (EBEs) in the procurement processes of state government and the state's public utilities. Members of the EBE Commission included leaders in state government, banking, private business and the public utilities. (Assembly Commission on Emerging Business Enterprise Procurement, Final Report March 1993, p. 1.)

program from those based upon government mandated set-asides or quotas and argues that consequently, City of Richmond v. J.A. Croson (1989) 488 U.S. 468, is-inapplicable here. According to Public Advocates, by urging no change unless an availability study is in hand:

> "utilities have suggested tactics that could inadvertently delay future achievements by three to ten years, thereby adversely affecting future California job development, economic development and competition that could enhance the efficiency of utilities and result in lower rates to ratepayers." (Reply Comments, p. 1.)

We are persuaded by the quality of the comments which argue against performance of an availability study rather than the quantity of the comments which would have us order one before we consider any increase in existing goals. Where, however, do we go from here?

Edison, alone among utility respondents, indicates a willingness to raise its goals. Edison states:

> "Evidence which would justify increased WMDVBE goals is the existence of the 20% goals for the past three years and the successful attainment of those goals. During the same period the number of new businesses has increased substantially. Edison therefore

> believes that satisfaction of increased goals (other than for fuel) would not be difficult." (Comments, p. A-9.)

We find this assessment compelling. We urge utility managements to rethink their reluctance to voluntarily explore the ability of their respective companies to increase WMDVBE procurement.; Each utility, which upon-further reflection, determines it will undertake a good faith effort to increase WMDVBE procurement, is invited to file and serve comments stating that intent in this docket within 30 days of the effective date of this order. We will monitor responses and further review this matter, as necessary.

With respect to goals for procurement from businesses owned by minority women, we note that while individual goals are not contained in GO 156; utilities are currently required to establish and report, separately, goals for both minority and non-minority women. (GO 156, § 8.4.) Any expansion of goals, generally, should take into account the possibilities for increased procurement from these two groups.

Technical and Economic Assistance

In general, the utilities support provision of technical and economic assistance to WMDVBEs on a voluntary basis and/or urge that a Croson study (as opposed to an availability study) be done before assistance is mandated. We are persuaded, after review of the comments, that mandating technical/economic assistance on the basis of race or ethnic

origin would invite attach on constitutional grounds. Therefore, we find it prudent to direct that technical and economic assistance offered by any-utility as part of its outreach effort should be offered only on a voluntary basis and only in a race-neutral manner, unless it is offered in reliance upon a Croson study which finds such a remedy necessary.

Inclusion of Disabled-owned Business Enterprises in the GO 156 Program

The Americans with Disabilities Act (ADA) is designed to protect qualified individuals from employment discrimination. Under the ADA, an individual with a disability is defined as a person who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

The issue before the Commission is not whether the GO 156 program should comply with the ADA, which is designed to address employment discrimination, but rather, whether disabled-owned business enterprises should be added to the current WMDVBE program.

It is clear that disabled-owned business enterprises are distinguishable from the DVBEs which the legislature added to our existing program in recognition of the sacrifice made by veterans disabled in military service to this country. However, though we are not without genuine sympathy for the difficulties experienced by disabled persons, we must

recognize that the legislature has not as yet found that disabled owners of businesses, like WMBEs, "have traditionally received less than a proportionate share of regulated public utility procurement contracts." (PU Code § 8281(b)(1)(C).) Absent such a legislative determination and the direction to us to expand the GO 156 program, we will not impose the additional costs associated with doing so upon utility ratepayers.

Additional Issues

Based upon the comments received, we find that other issues raised in the OIR, including but not limited to the reporting of procurement results and the scheduling of future, routine WMDVBE proceedings, require further consideration by the parties. Disposition of these additional issues may or may not be suited to evidentiary hearings or various methods of alternative dispute resolution, including workshops. We will direct the assigned administrative law judge to set a prehearing conference within the next 60 days at which the parties shall be prepared to discuss their preferred means of resolving outstanding issues in this OIR.

Findings of Fact

1. This rulemaking proceeding was instituted to determine whether GO 156 should be revised to better address issues related to WMDVBEs in light of experience gained in the administration of this program over the years.

2. Comments received in response to issues specified in the OIR have demonstrated a clear need for the Commission to make certain policy determinations before the Commission may proceed with resolution of issues raised in the OIR.

3. In response to legislation directing creation of a program to provide women and minority owned businesses with an opportunity to participate in utility procurement, the commission established a clearinghouse for the purpose of verifying the status of vendors claiming women or minority owned status.

4. The clearinghouse is currently operated by the Cordoba Corporation.

5. Over the years, other governmental agencies have created similar programs designed to ensure that vendors who apply to do business with them have bona fide women or minority ownership.

6. In response to the proliferation of such status verification programs, the Legislature enacted AB 486, effective January 1, 1993, specifically to effect "one-stop shopping" with uniform, reciprocal, integrated standards to govern procurement by state agencies from WMBEs.

7. In light of the enactment of AB 486, the OIR sought information as to whether WMBEs should face different verification/certification standards depending upon whether they were contracting with state agencies or public

utilities and whether a utility-specific clearinghouse should be maintained under the GO 156 program.

8. The majority of those filing comments support replacing the GO 156 verification standards with the certification procedures of AB 486.

9. The comments are not unanimous as to whether the -Commission should maintain a separate utility-specific clearinghouse; among the seven large utilities, two favor abandonment of the clearinghouse, four support retention of a "streamlined" version, and one utility suggests that the matter should be "researched."

10. AB 486 specifically recognizes Caltrans as the agency ; responsible for establishing and administering computerized databank of certified WMBEs and provides that the certification criteria utilized by Caltrans are the same as those found under Part 23 of Title 49 of the Code of Federal Regulations.

11. Existing goals encourage procurement levels of at least 15% from minority owned businesses and-at least 5% from women owned businesses; individual goals for DVBEs have yet to be established.

12. The legislature has found that the specification of initial long term procurement goals shall not prevent utilities from seeking parity with public agencies' awards of as much as 30% of all contracts to WMDVBEs.

13. In the OIR the Commission reminded parties that Commission approval is not necessary for the utilities to voluntarily increase their WMBE goals.

14. The comments do not signal unanimous utility inclination to move beyond legislatively urged performance; one utility states increases in WMDVBE procurement are justifiable and would not be difficult.

15. The legislature has not authorized funding for the statewide availability study approved in SB 718.

16. The utilities generally support provision of technical and economic assistance to WMDVBEs on a voluntary basis and argue that no mandatory assistance be required until a Croson study has been completed.

17. The OIR asks not whether the GO 156 program should comply with the ADA, but rather, whether disabled-owned business enterprises should be added to the current WMDVBE program.

Conclusions of Law

1. The Commission should adopt the certification criteria of AB 486 for use in our WMDVBE program and should revise GO 156 § 2 to accomplish this end.

2. Before the Commission can devise appropriate modifications to GO 156 § 2, it must determine whether there is good reason to continue to maintain a utility-specific clearinghouse.

3. Maintenance of a separate WMBE clearinghouse for use by the utilities and the Commission may no longer be justified.

4. Verification of DVBEs covered by GO 156 has been delegated to the Department of General Services, Office of Small and Minority Business, and the standards and guidelines established by that office should continue to be utilized by the Commission and the utilities for verification of the status of DVBEs.

5. A logical extension of the move toward "one-stop shopping" for WMBE certification with its concomitant aims of reducing duplicative, overlapping governmental functions and eliminating the associated, unnecessary expenditure of time and capital by the private sector, suggests the Commission explore whether the GO 156 program might use the Caltrans databank as the central database of certified WMBEs.

6. The Commission's WMDVBE staff should conduct 4 study to determine the comparability of the Caltrans program to our GO 156 program and the feasibility of using the Caltrans databank in that program and file that report in this docket within 60 days of the date of this order.

7. Though goals for procurement with DVBEs will not be established until 1997, the Commission is committed to seeing DVBE procurement evolve, in the very near term, into a successful part of the overall GO 156 program.

8. Strong legal arguments support the contention that the GO 156 program goals may be increased without first performing-an l availability study.

9. Utilities which determine they will undertake a good faith effort to increase WMDVBE procurement should file and serve a statement of intent in this docket within 30 days of the date of this order.

10. Mandating technical and economic assistance on a non-race neutral basis could invite attack on constitutional grounds.

11. Utilities which offer technical and economic assistance as part of its outreach effort should be offered only on a t voluntary basis and only in a race-neutral manner, unless it-is offered in reliance upon a Croson study which finds such a remedy necessary.

12. The ADA is designed to protect qualified individuals from employment discrimination.

13. Absent a legislative determination that disabled owners of business should be included in the GO 156 program, we will not impose upon ratepayers the additional costs associated with expanding the program.

INTERIM ORDER

IT IS ORDERED that:

1. Within 60-days of the effective date of this order, Commission staff shall conduct a study to determine the

comparability of the California Department of Transportation (Caltrans) program to the Commission's General Order (GO) 156 program and the feasibility of using the Caltrans databank in that program and shall address all specific issues we have raised in the text of this order. Commission staff shall file that report in this docket and shall serve the report on all respondent utilities and all other parties who, within 45 days of the effective date of this decision, submit a request for a copy with Philip H. Bremond, Manager of the Women/Minority/Disabled Veterans Business Enterprises (WMDVBE) program, Room 2006, State Building, 505 Van Ness Avenue, San Francisco, California 94102.

2. Within 30 days of the effective date of this order, utilities which determine they will undertake a good faith effort to increase WMDVBE procurement shall file and serve comments stating their-intent in this docket.

3. Pending further order of the Commission, utilities are encouraged to provide, as part of their individual WMDVBE outreach programs, technical and economic assistance on a voluntary, race-neutral basis

4. Within 60 days of the effective date of this order, the assigned administrative law judge shall set a prehearing conference at which the parties shall be prepared to discuss their preferred ; means of resolving outstanding issues in this rulemaking proceeding.

This order is effective today.

Dated August 3, 1994, at San Francisco, California.

DANIEL Wm. FESSLER
President
PATRICIA M. ECKERT
NORMAN D. SHUMWAY
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
Commissioners

...STION FILED
DEC 14 1995

No. 95-767

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In The

Supreme Court of the United States

October Term, 1995

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,

Petitioner,

v.

J. JACK BRAS, INDIVIDUALLY AND DOING BUSINESS AS J. JACK BRAS & ASSOCIATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF ON BEHALF OF PETITIONER THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

To The Honorable William H. Rehnquist, Chief Justice of the Supreme Court of the United States:

Statement of Interest[1]

AT & T Corporation ("AT&T"), Pacific Gas and Electric Company ("PG&E"), and Southern California Edison Company ("Edison") (collectively "Utilities") are among the largest public utilities in California. AT&T is a long distance carrier, PG&E is a combined power and energy company, and Edison is a power company. All of the Utilities are subject to the Public Utilities Commission's General Order 156, the regulation at issue. Under that regulation, the Utilities together purchase over $375 million worth of goods and services annually from minority, disabled veteran and women-owned business enterprises in California.

The Utilities believe that increasing diversity in their supplier relationships is a corporate imperative. The California Legislature has also declared that encouraging and

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[1] Supreme Court Rule 37.2(b) provides that a motion for leave to file an *amicus curiae* brief may be presented to the Court as one document with the brief sought to be filed when a party to the case has withheld consent. Petitioner, the Public Utilities Commission of the State of California, has given written consent. See CPUC Letter included with this filing. Respondent J. Jack Bras has withheld consent to this filing. Accordingly, AT&T, PG&E and Edison respectfully submit this motion and brief.

developing the capacity of women, minority and disabled veteran business enterprises is vital to the well-being of California's economy. Cal. Pub. Util. Code § 8281(a). The California Public Utilities Commission (the "Commission") through its General Order 156 provides clear guidelines and objectives which help the Utilities achieve their goal, and the state to achieve its. The Utilities therefore have a strong interest in preserving the vitality of General Order 156.

The Ninth Circuit's decision puts General Order 156 under a cloud it does not deserve. The decision states that the regulation has the "practical effect" of requiring discriminatory programs. The Utilities, which operate under the regulation, are clear that it does not. They understand that they are free under the Order to design and implement their own programs. A state may legally encourage businesses to increase their commitment to diversity. That is all General Order 156 does.

However, the Ninth Circuit's decision opens the door to attacks on the regulation by persons (like Mr. Bras) who are unable to show that it has, or ever will, hurt them. Leveling the playing field for all is a vitally important goal of the Utilities, the state and the country. General Order 156 advances this goal without requiring or even encouraging discrimination. But even if the regulation encouraged the adoption of discriminatory programs, this Court's decisions make clear that those programs would have to be subjected to a searching review. That review should not, and cannot, be performed in the abstract, and that is the result the Ninth Circuit's decision would force.

For these reasons, the Utilities respectfully request leave of Court to file this *amici curiae* brief in support of the Commission.

DATED: December 14, 1995.

McCUTCHEN, DOYLE,
BROWN & ENERSEN

By: _____

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I. INTRODUCTION

This case is literally unprecedented.

The California Public Utilities Commission ("Commission") required utilities to submit plans, including goals, in respect to purchases from women and minority vendors. The goals were to be "targets," not "quotas," "requirements" or set asides. Each utility was free to fashion its plan as it wished. One fashioned a process unique to it that, among other things, assigned a 10-point bonus to minority and women bidders on a single bid for architectural services. A white male architect bid to provide services to that utility, but was turned down. He sued the Commission, some of its officers and the utility, alleging that the utility's implementation of its bonus scheme caused him to be turned down, and so injured him.

After suit was filed, the architect settled with the utility, dismissed it from the suit, and completely redressed whatever injury he ever had. The architect has not been injured by any other utility and has never sought to work for one. Nonetheless, the architect continued suit against the Commission and attacked the Commission's Order in the abstract.

The Ninth Circuit ruled the architect had standing to make that attack. If allowed to stand, that ruling authorizes any plaintiff, any time, anywhere, to attack any governmental agency's general policy encouraging private parties to adopt affirmative action policies of their own, notwithstanding that (a) the government's policy has not and cannot possibly cause plaintiff any injury; (b) only private action can cause injury; and (c) the only private actor who ever arguably injured plaintiff or, he imagines, ever might, is not before the Court, and, in the case before the Court, never will be.

"A carefully designed affirmative action program" may help realize the Fourteenth Amendment's promise. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2134, 2136 (1995) (Ginsburg, J., dissenting, but writing to "underscore . . . the considerable field of agreement . . . revealed in opinions that together speak for a majority of the Court.") A court must undertake a "searching," "close review" to determine whether a carefully designed plan has that benign, or instead, a malign effect. *Id.* at 2136. Under the Ninth Circuit's decision, an uninjured plaintiff can force a court to undertake that searching review, not with regard to a carefully designed plan, but in the abstract and without regard to any plan. Thus, the decision opens to abstract attack every WMBE plan of every utility – indeed, of every buyer of goods and services – although the plan has injured no one. It also opens to abstract attack every statute, ordinance and governmental order regarding the purchase of WMBE goods and services, although there is no plan implementing the statute, ordinance or order, and no one has been hurt at all.

Therefore, upon this most sensitive, difficult issue, the Ninth Circuit's decision opens the litigation floodgates, and sanctions exactly what two centuries of standing law and Article III of the Constitution are meant to prevent. No case has ever sanctioned anything like it before. As utilities subject to the Commission's jurisdiction and fully supportive of its women and minority procurement goals, we urge review.

II. STATEMENT OF FACTS

The facts are these. They are taken in large part from the Ninth Circuit's and trial court's recitation.

A. The Code And The General Order

In 1986, the California State Legislature enacted the "Women and Minority Business Enterprises" ("WMBE") Law, codified as sections 8281-8286 of the California Public Utilities Code ("Code"). The Legislature declared that "the essence of the American economic system of private enterprise is free competition;" that competition is "basic to the economic well-being of this state;" and that that "well-being cannot be realized unless the actual and potential capacity" of WMBEs "is encouraged and developed." Pub. Util. Code § 8281(a). Accordingly, the purpose of the WMBE law is, among other things, "to encourage greater opportunity" for WMBEs and so "promote competition" among utility suppliers. Pub. Util. Code § 8281(b)(2). To those ends, the law empowers the Commission to "require each electrical, gas and telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000) . . . to submit annually, a detailed and verifiable plan for increasing women, minority, and disabled veteran business enterprise procurement in all categories." Pub. Util. Code § 8283(a).

Pursuant to Section 8283(c), the Commission promulgated and implemented General Order 156 (the "General Order"). Section 8 of the General Order calls on each utility to set "substantial and verifiable short-term (one year), mid-term (three years), and long-term (five years) goals for the utilization of WMBE's." Section 8.2 provides that "[e]ach utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases from outside vendors of not less than 15% for minority owned business enterprises

and not less than 5% for women owned business enterprises." A "goal" is a "target which when achieved, indicates progress in a preferred direction. A goal is neither a requirement nor a quota." Gen. Ord. § 1.3.13.

The Commission has advised this Court that "it does not prescribe any particular method or means by which utilities must pursue these goals. Each utility is free to design its own . . . program" according to its "particular requirements and needs," and "to use its judgment" to determine the "means" to achieve its goals. Pet., p. 3. *Amici* understand the General Order and the Commission's practice as it has represented it. Indeed, each *amicus* has voluntarily designed and implemented its own program, using its judgment.

Our programs were not before the lower courts, and we do not mean to intrude them into the record before this Court. That would be improper, and beside our point: The Ninth Circuit's ruling allows an attack upon the Commission's General Order, in the abstract. As a result, our voluntary programs promoting unquestionably lawful outreach efforts to increase procurement from women and minorities are subject to serious but unnecessary challenge.

B. Pacific Bell's Program and Past Acts

Pacific Bell, a utility subject to the Commission's jurisdiction, designed and adopted a WMBE plan for itself, applicable to vendors to it. One of its bids called for vendors interested in doing business with Pacific Bell to respond to a questionnaire. Question 10 of the questionnaire asked, "[A]re you currently certified through the Cordoba Corporation Clearing House process for Minority/Women Business Enterprise status?" Petition Appendix ("App.") 94-96.

Pacific Bell assigned numbers to each respondent's answers, added the numbers up, and so ranked the respondents according to their scores. The total possible points was 95. A "yes" answer to Question 10 was worth 10 points, and a "no" answer zero. App. 46.

J. Jack Bras is a white male architect who had provided architectural services to Pacific Bell from 1969-1991. In 1991 Pacific Bell wrote Bras and other architectural firms, explaining that it intended to limit the number of its business relationships, and asking that architects interested in working for it fill out the questionnaire. Bras responded, and answered Question 10 no, for zero points.

Thirteen architectural firms responded, and Pacific Bell rank ordered them, by the numbers, in accordance with its bidding scheme. Bras ranked sixth, and Pacific Bell negotiated with the top three only. Pacific Bell's representative, Mr. Behuresht, said that Bras would have ranked third numerically if Question 10 had not been considered. Behuresht also explained that Pacific Bell did not select entirely on mathematical rankings, but only used them to determine the firms to negotiate with. Behuresht Deposition, App. 103-105.

Pacific Bell's process for selecting architects was unique; no one has claimed or could claim that any other utility's program was anything like it. Also, Bras' experience with Pacific Bell was unique to it. He did not claim he had ever worked or applied to work for any other utility, or ever planned to.

C. The Settlement And Dismissal

On January 10, 1992, Bras brought an action pursuant to 42 U.S.C. §§ 1981, 1983 and 1985 against Pacific Bell

and the Commission and two of its officers.[2] He alleged that Pacific Bell's program and the implementation of it discriminated against him on the basis of race and sex and violated his rights under the Fourteenth Amendment's Equal Protection Clause. Bras sought damages for that alleged injury. He also charged that California Public Utilities Code §§ 8281-8286 and the Commission's General Order 156 were unconstitutional and should be declared void on their face. He further sought a permanent injunction forbidding the Commission from implementing the Order.

During the pendency of the District Court proceedings, Bras settled all claims with Pacific Bell and dismissed it from the case. Bras represented to the District Court that 50% of the settlement money compensated him for economic damages (i.e., lost business from Pacific Bell) and 50% compensated him for noneconomic damages. *Bras v. California Public Utilities Commission*, No. CV-92-0304-WHO, slip op. at 9 (N.D. Cal. March 17, 1993) ("*Bras I*").

Accordingly, Bras had no grievance left with Pacific Bell, and no future grievance on any horizon. He could not apply to perform services for Pacific Bell for three years, when the three-year terms of the agreements it executed under its program expired. There was no evidence in the record as to what Pacific Bell's program, if any, would look like when the three years were up, or, for that matter, whether its program is the same today as when Bras filed his application under it.

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[2] Philip Bremond was named in his representative capacity as WMBE Program Manager for the Commission. Neal Shulman was named in his capacity as the former Executive Director of the Commission. The Commission, Bremond and Shulman are collectively referred to as "Commission."

Of course, Bras has no past, present or future grievance with any other utility, never having worked for any and having no plans to.

D. The Remaining Parties, And The District Court's And Ninth Circuit's Rulings

Bras dismissed the utility that allegedly violated his rights. His only remaining claims were for declaratory and injunctive relief against the Commission. The Commission, however, had not adopted Pacific Bell's program, nor turned down Bras under it. Accordingly, having been compensated for the injury he allegedly suffered, he attacked the Commission's General Order facially only.

The District Court held Bras had no standing to wage that abstract attack. It reasoned that "Bras might be able to argue (although it is by no means likely that he would have succeeded) that the WMBE and the General Order prevented him from obtaining future business with Pacific Bell. Plaintiff's settlement, however, extinguished all of his claims with respect to Pacific Bell." *Bras I*, App. 39, (original underscoring). The District Court further found that Bras had not presented a "shred" of evidence that Pacific Bell would not have reduced the number of architectural firms it used in the absence of the WMBE and the General Order, *Bras I*, App. 41, nor that Pacific Bell "would reevaluate its decision not to retain . . . [Bras] for future business were the WMBE nullified." *Id.* Moreover, Bras' only "legal complaint" against Pacific Bell was that it should not have considered his WMBE status in its application process, and his settlement "effectively extinguished" that complaint. Therefore, and necessarily, Bras' complaint "that the WMBE and the General Order interfered with his business opportunities" is likewise extinct.

The Ninth Circuit reversed, concluding that Bras had standing to complain anyway. *Bras v. California Public Utilities Commission*, 59 F.3d 869 (9th Cir. 1995) ("*Bras II*"). Indeed, the Ninth Circuit looked to the merits upon this standing case. Thus it found that, while the Code and Order "do not expressly state that public utilities must adopt any particular programs such as bidding preferences or set asides, they clearly have the practical effect of requiring them to do so." *Bras II* at 875. It also found that the Code and Order "effectively encourage, if not compel, Pacific Bell to adopt discriminatory programs . . . . " *Id.* There is no basis for the conclusions and they are in fact incorrect.

First, as the dissent pointed out, there was no evidence whatever to support them. Moreover, although the findings speak to the General Order's practical effect on the utilities, no utility was before the Court. Pacific Bell was dismissed from the case, and no other utility was ever a party to it. These *amici* utilities find the Court's findings as to the Order's effect on them baffling and contrary to fact. The Code and Order do not encourage, much less require, that they adopt "set asides" or "discriminatory programs."

One uninjured by a program ought not be empowered to force a Court to undertake the "searching review" necessary to "ferret" out the program's effect; after all, a program that has not injured him has no effect on him. Surely a court cannot conclude that an Order forces utilities to commit discriminatory acts in the absence of any claim pending against any utility supposedly forced to commit them. That is particularly so since the purpose of the Order is to foster free competition, not to discriminate, in the first place. The law of standing forbids what the Ninth Circuit sanctions. We turn to the law.

III. SUMMARY OF ARGUMENT

Standing is an essential part of the case-or-controversy requirement of Article III, and serves to identify disputes properly resolved by courts, as opposed to the legislature or the executive. The doctrine requires proof of (1) a concrete, particularized injury in fact; (2) a causal connection between the injury and the conduct complained of traceable to defendant's, not some third party's, action; and (3) likelihood that a favorable decision will redress the injury.

This dispute fails all three tests.

(1) Bras has no past injury, and no damage claim at all, having settled it. His "someday" intention to compete pursuant to an unidentified "someday" Pacific Bell program is ephemeral, not the predicate of actual, imminent, concrete injury. Part IV.A.

(2) There is no causal connection between Bras' (non-existent) injury and the Commission's Order, because the Order created no "barrier" against him and in fact did nothing at all to him. Pacific Bell's program, if anything, caused his injury. Pacific Bell, however, is not before the Court, Bras having settled with it. Thus Bras' only arguable injury was caused, if by anyone, by a third party not before the Court, not the Commission. Part IV.B.

(3) There is no likelihood that a favorable decision will redress Bras' injury, because it has already been redressed, Pacific Bell having paid for it. Also, Pacific Bell is not before the Court. No Order against the Commission could enjoin a party not before the Court to redress anything in any event. Part IV.C.

The Ninth Circuit's decision opens the litigation floodgates to uninjured plaintiffs, and subjects WMBE programs that hurt no one to attack in the abstract. The decision also requires courts to engage in a searching review of WMBE programs in the abstract, without any

real program before the Court to search. That search should only be undertaken in the context that two centuries of standing law require it be undertaken: The context of a concrete case or controversy involving flesh and blood people with positions based on actual fact, not speculation. Speculation is an infirm basis for adjudication, particularly in this most sensitive area. Part V.

IV. ARGUMENT

The "Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislators, to executives, and to courts." *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The doctrine of standing serves to identify those disputes which are "appropriately resolved" by courts. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). The doctrine's core component "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560.

This is the classic legislative, not judicial, dispute; Bras takes issue with the wisdom and propriety of the Legislature's WMBE law and the Commission's General Order, in the abstract. There is no "concrete and particularized" injury giving rise to a real case or controversy for a court to resolve, *id.*, and could not be. Bras settled his dispute with Pacific Bell, the party that supposedly injured him, and so redressed whatever injury he had; therefore, there is nothing at all for a court to resolve.

The standing doctrine mandates that at a minimum a plaintiff must demonstrate three things: (1) "injury in fact," that is, "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical' " (*Lujan*, at 560, italics omitted); (2) a "causal connection between the injury and the conduct complained of," that is, the injury must be "traceable" to the defendant's actions, not "the

independent action of some third party not before the court," (*Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Lujan*, at 560); and (3) it is "likely," not "merely speculative," that the injury will be redressed by a favorable decision (*Simon*, 462 U.S. at 41-42; *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Lujan*, 504 U.S. at 560-61).

Bras' dispute does not come close to passing any of those tests. The Ninth Circuit's decision finding that it does, makes the tests, and therefore the standing doctrine, meaningless. *Amici* offer their views on each test. They are hopeful that, as regulated utilities subject to the Commission's jurisdiction themselves, their perspectives as to the application of the tests may be useful to the Court.

A. No Real Injury

There is no injury at all, much less a "concrete and particularized," "actual or imminent," injury here.

To start with, there is no past injury, or any damage claim whatever. Bras' damages claim was settled and dismissed. Thus Bras' claim looks to the future, only, and he sues the Commission for declaratory and injunctive relief only. Accordingly, he must show a "very significant possibility of future harm in order to have standing." *Bras II* at 873, quoting *Coral Construction v. King County*, 941 F.2d 910, 929 (9th Cir. 1991).

The Ninth Circuit found Bras had made that showing, relying upon *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 113 S. Ct. 2297 (1993) ("*Northeastern*"). The Court reasoned that under *Northeastern*:

(1) "Plaintiffs alleging equal protection violations . . . need only show that they are forced to compete on an unequal basis," *Bras II* at 873; as to that, *Northeastern* states that "[I]n the context of a challenge to a set-aside program, the 'injury in fact' is the inability to

compete on an equal footing in the bidding process, not the loss of a contract." *Northeastern*, at 2303.

(2) "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group . . . [t]he injury in fact is the denial of equal treatment resulting from the imposition of the barrier." *Id.* at 2303, quoted at *Bras II*, p. 873.

(3) Bras' undisputed inability to compete for a Pacific Bell job for three years "does not change the analysis." *Id.*

(4) Bras' "earnest[ ] desire" to compete, plus Pacific Bell's having been pleased with his past work, plus its willingness to "consider him when it reconsiders its needs" three years hence is "sufficient to establish . . . that Bras will suffer future injury if the program is not enjoined." *Id.* at 874.

Each of those propositions is wrong, inapplicable, or both.

(1) Bras' attack is not a "challenge to a set-aside program," because no program is in issue. Bras sues the Commission only. The Commission created no program and mandated none, set-aside or otherwise. Part II.A, above. Pacific Bell created a program, but even if it were a "set-aside program," Bras can't challenge it; Bras settled all of his claims with Pacific Bell, and it is not and will not be before the Court in this proceeding. To be sure, the Ninth Circuit found that "in practical effect" the Commission's General Order requires a set-aside program. But that finding has no record support whatsoever and simply demonstrates the seriousness of the court's error; the "searching review" required to determine the effect of a program can't be performed in the absence of a program to review. Part II.D, above.

(2) Government did not "erect a barrier" here. In *Northeastern*, the Government had; the City designed and

ran the program at issue there. Here the Government did neither; Pacific Bell did both.

(3) The fact Bras cannot compete for three years emphatically "change[s] the [*Northeastern*] analysis." In *Northeastern*, the members of a contractors association "regularly bid" on jobs, in the present, not sometime in the future. 113 S. Ct. at 2299, 2304. Likewise, in *Adarand*, plaintiff bid on every guardrail job in Colorado, and the jobs came up at least once a year. 115 S. Ct. at 2105.

In *Northeastern* and *Adarand*, the bidder's injury was imminent. Here it is not. To the contrary, Bras has settled with Pacific Bell and that settlement provides that Bras cannot compete for three years. Bras' intention to compete in three years in respect to an unidentified Pacific Bell job pursuant to a Pacific Bell program not in being – is a "some day" intention, with no "concrete plans" to effect it. Therefore, his intention does not support a finding of "actual or imminent injury." *Lujan*, above, 504 U.S. at 564. That is particularly so here, because Bras' "hypothetical," "conjectural," "some day," "possible" injury will supposedly be effected by "the independent action of some third party not before the court," *id.* at 560, Pacific Bell. The record does not disclose what Pacific Bell will do in response to whatever Bras does at any time, let alone in three years.

Imminence is "concededly a somewhat elastic concept," *id.* at 565, n.2, but stretched too far it breaks. The Ninth Circuit's stretch is too far.

(4) There is no evidence "sufficient to establish . . . that Bras will suffer future injury if the program is not enjoined," and it would not matter if there were. First, no one knows from the record what program, if any, Bras will compete in three years hence, much less that whatever the program is will injure him. Second, no program and no program designer are before the Court, so there is no program to enjoin in the first place.

In sum, Bras cannot bootstrap a fanciful future scenario featuring a dismissed party as principal character into a "distinct and palpable" injury. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982), quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975). At bottom, Bras simply complains that the Commission's Order is not to his liking. Therefore, his complaint is an "undifferentiated," "impermissible 'generalized grievance.' " *Lujan*, at 575, quoting *United States v. Richardson*, 418 U.S. 166, 171, 176-177 (1974). There is no injury in fact. "[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Allen*, at 754.

B. Causal Nexus

Bras attacks the General Order. The General Order, however, cannot in the nature of things directly cause Bras injury, because it does not itself do anything. The utilities, independent third parties to whom the Order applies, design programs in response to it. Accordingly, Bras' theory must be that the Order necessarily causes those independent third parties to design unlawful programs, and those programs in turn caused him injury. In other words, Bras charges that government regulation caused an independent third party to do the deed that allegedly injured him. Bras carries a heavy burden to prove that charge:

> When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps on the response of others as well. The existence of one

> or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," [citations omitted] and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.

Lujan, at p. 562 (original italics).

Bras cannot carry that burden. First, he has no injury because he dismissed his claim in respect to that alleged injury. Part II.C, above. Second, the utility whose program allegedly caused his supposed injury is not before the court. The record does not reveal what program it now has or will have when, if ever, Bras applies to work for it again. *Id.* Third, Bras never worked for another utility, no evidence shows he ever wants to, and no evidence shows what program whatever utility he may want to work for has now or will have when he wants to work for it, if he ever does.

Fourth, Bras cannot show the General Order causes utilities to adopt discriminatory programs in any case, because it doesn't. The Order is intended to effectuate the State's policy to foster free competition, and to that end to level the playing field, not unfairly tilt it.[3] The Order

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[3] Pub. Util. Code § 8281(a): "[I]t is the declared policy of the state to aid the interests of women, minority, and disabled veteran business enterprises in order to preserve reasonable and just prices and a free competitive enterprise, to ensure that a fair proportion of the total purchases and contracts or subcontracts for commodities, supplies, technology, property, and services for regulated utilities are awarded to women, minority, and

provides for goals – targets – not requirements or quotas. Part II.A, above. The Order does not mandate or specify set asides, bid preferences or other quota mechanisms or any other means to achieve any goal. Indeed, the Order prohibits use of discriminatory quotas. Nor does the Order mandate that anyone discriminate against anyone. Instead, the Order leaves each utility free to achieve its goals in whatever way it sees fit.

Pacific Bell freely adopted a program unique to it, and *amici* and other utilities freely adopted programs unique to them. Bras claims that Pacific Bell's program hurt him, but even if it did, that claim is not before the Court. Moreover, there is no showing that whatever program Pacific Bell or anyone else freely adopts in the future will hurt him then, and none of those hypothetical programs freely adopted by those independent third parties is before the Court.

Bras, however, sues the Commission only, and attacks its Order in the abstract, only. He cannot do that. Article III requires that a federal court act "only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of *some third party not before the court.*" *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (emphasis added) (IRS ruling granted tax benefits to hospitals that offered only ER services to indigents; indigents lacked standing to attack

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disabled veteran business enterprises, and to maintain and strengthen the overall economy of the state."

Pub. Util. Code § 8283(c): "The commission shall establish guidelines for all electrical, and telephone corporations with gross annual revenues exceeding twenty-five million dollars ($25,000,000) and their commission-regulated subsidiaries and affiliates, to be utilized in establishing programs pursuant to this article."

ruling because whether hospitals would provide other services absent the ruling was "purely speculative"); *Warth v. Seldin*, 422 U.S. 490, 504-5 (1975) (town zoning ordinance required single-family homes with allegedly unreasonable requirements relating to lot size, setback, etc.; indigents alleged ordinance excluded them from town; indigents lacked standing because, among other things, whether third-party developers would build affordable housing in town absent the ordinance was speculative); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983) (plaintiff must show he "sustained or is immediately in danger of sustaining some direct injury").

The *Bras II* dissent, *amici* believe, correctly sums it up:

> The majority attempts to gloss over this [causal nexus] issue by stating that "[b]ecause the Code and Order effectively encourage, if not compel, Pacific Bell to adopt discriminatory programs, there is a sufficient nexus between Bras' injury and the Commission's actions in enforcing the Code and implementing the Order." This conclusion is insupportable. The Code and Order do nothing more than to require utilities to set goals for hiring women and minority contractors. The provisions do not imply or suggest, and certainly do not compel utilities to use discriminatory programs.
>
> . . .
>
> Bras is challenging the actions of the Commission. The Commission's actions are not discriminatory, and there is not a sufficient nexus between the state's provisions and any future

injury that Bras may incur from a utility's specific program.

Bras II at 878.[4]

C. Redressability

There is no likelihood that Bras' injury will be redressed by a favorable decision. First, his injury, if any, has already been redressed; Pacific Bell paid him for it. Second, the Commission is before the Court, but its Order specifies no program terms and creates no program, much less the one Bras says injured him. Third, the party who Bras said did injure him or someday will is not before the Court. Part II.C, above. Fourth, no order against the Commission could enjoin a party not before the Court from implementing whatever program it chooses to implement. *See Lujan*, above, 504 U.S. at 569 (suit against Secretary of Interior; court order would not be binding even on other governmental agencies, because "they were not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced.").

"The basic inquiry, for each party seeking to invoke the authority of the federal courts [citation omitted], is

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[4] The Ninth Circuit's opinion declares without discussion that the Code and General Order "clearly have the practical effect of requiring" public utilities to adopt bidding preferences or set-asides, *Bras II*, App. at 875, but it does not. Part II.A, above. Nor does it "encourage" discrimination. *Id.* Moreover, even if it did, it "is purely speculative" whether any plan could be traced to that "encouragement or instead results from decisions" made freely by the plan's designer. Therefore, encouragement, if it existed, would not establish standing here. *Simon*, above, 426 U.S. at 42-43. *See also Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1554 (11th Cir. 1989) (a general policy that *permits but does not require* agencies to act unconstitutionally is not unconstitutional on its face).

whether that party alleges personal injury that is fairly traceable to the challenged conduct and likely to be redressed by the requested relief." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615-616 (1989), quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). The answer to the inquiry here is no. Whether Bras' "injury would be redressed by a favorable decision in this case depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Asarco*, 490 U.S. at 615.

Bras' claim fails all three standing tests.

V. THE REAL INJURY

"The unhappy persistence of both the practice and lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand*, above, 115 S. Ct. at 2117. The government's response here is not discriminatory on its face. Even if it were discriminatory on its face, judicial review of it must be "searching," to "ferret" out benign from malign programs. That is not an easy task. For example, some members of historically disadvantaged groups may be hurt by programs designed to help them, and preferences ought not "trammel unduly upon the opportunities of or interfere too harshly with legitimate expectations of persons in once-preferred groups." *Id.* at 2136, (Ginsberg, J., dissenting and citing Souter, J., dissenting). This Court's recent decisions reflect the difficulty of the task and indeed of defining it. Thus between them *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Adarand*, above, 115 S. Ct. 2097; *Fullilove v. Klutznick*, 448 U.S. 448 (1979); *Wygant v. Jackson Board of Education*, 476

U.S. 267 (1986); and *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) generated twenty-five separate opinions.

A court ought not and truly cannot undertake that difficult, searching review if there is nothing real before it to search. It ought not and truly cannot undertake that searching review in the abstract. Instead a court must undertake it in the context that Article III and two centuries of law require it be undertaken: The context of a concrete case or controversy involving flesh and blood people with positions based on actual facts, not speculation. The Ninth Circuit's decision forces courts to undertake a searching review in the abstract, and so calls upon them to perform an unwise, indeed impossible, act. The Constitution, and common sense, forbid that excursion.

CONCLUSION

Amici respectfully ask this Court to grant their motion for leave to file an *amici curiae* brief. In addition, *Amici* request that this Court grant the petition for certiorari by the Public Utilities Commission of the State of California.

DATED: December 14, 1995.

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No. 95-767

In the Supreme Court of the United States

OCTOBER TERM, 1995

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al.,
Petitioner,
vs.
J. JACK BRAS, individually and dba J. JACK BRAS & ASSOCIATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent challenges California Public Utilities Code sections 8281-8386 ("Code") and the Public Utilities Commission of the State of California's ("Petitioner" or "Commission") General Order 156 ("Order") alleging that the Code and the Commission's Order violated his constitutional rights under the 14th Amendment of the U.S. Constitution, as well as Article 1, Sections 7 and 8 of the California Constitution, on the basis of race and sex. As petitioner explained in the certiorari petition (Pet. 10-27), respondent failed to satisfy the bedrock standing requirements of Article III of the U.S. Constitution, and the Ninth

Circuit's holding to the contrary squarely conflicts with decisions of this Court.

In the instant case, respondent can manufacture no real, earnest and vital controversy against the Commission. "A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155-156 (1989). The Ninth Circuit has done so here. In so doing, the Ninth Circuit is transforming the federal courts into forums for airing " 'generalized grievances' about the conduct of Government." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 217 (1974) (citation omitted). This result not only opens the floodgates to unnecessary litigation, but also subverts the structure and functioning of government. Litigation brought in the absence of identified injury places unreasonable burdens on federal, state and local governments and upon the federal courts.

As stated in the certiorari petition (Pet. 27), the requisite links in the chain of causation between the Code and Order and any potential future asserted injury are far too weak for the chain as a whole to sustain respondent Bras' standing. *Allen v. Wright*, 468 U.S. 737, 759 (1984). Respondent has offered no persuasive or credible defense of the standing ruling by the court below and no persuasive reason why this Court should decline to consider these important issues.

I.

RESPONDENT'S OPPOSITION TO THE CERTIORARI PETITION, LIKE THE NINTH CIRCUIT DECISION BELOW, FAILS TO DEMONSTRATE THAT RESPONDENT SATISFIED THE INJURY REQUIREMENT FOR ARTICLE III STANDING

The Ninth Circuit, in a split decision, concluded that respondent Bras satisfied the injury requirement and there-

fore has standing to seek declaratory and injunctive relief against the Commission. *Bras v. California Public Utilities Commission*, 59 F.3d 869, 875-876 (9th Cir. 1995). Pet. App. 16.[1] However, Judge Pregerson strongly disagreed and concluded that Bras cannot show a "very significant possibility of future injury," that the Code and Order do not erect a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, and that Bras cannot show the necessary causal nexus between his alleged injury and the Commission's conduct. *Id.*, 876-879. Pet. App. 17-18. As demonstrated in petitioner's certiorari petition, the Ninth Circuit's relaxation of the injury-in-fact prong of Article III standing undermines constitutional standing requirements and impermissibly expands federal court jurisdiction. Pet. 11-19. The district court properly dismissed respondent Bras' complaint. Judge Pregerson agrees. Simply put, there is no injury.

A. Respondent's Opposition Fails to Address The Specific Factual Predicate Which Distinguishes This Case From Others Upon Which Respondent Erroneously Relies.

Petitioner has pointed out the difficulty of establishing standing in the factual context of the instant case, where the alleged injury is traceable to a third party actor, Pacific Bell, who is not before the Court. Pet. 21-22. Although standing is not precluded, it is ordinarily "substantially more difficult to establish." Pet. 22, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The Ninth Circuit failed to address this critical distinction, thereby conflicting with *Lujan* and with its own precedent in *Coral Constr. Co. v. King County*,

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[1] Where indicated, "App." refers to the Appendix. When referring to the Appendix to the certiorari petition, the reference is indicated as follows: "Pet. App." When referring to the Appendix to this reply brief, the reference is indicated as follows: "Rep. App."

941 F.2d 910 (9th Cir. 1991) *cert. denied*, 502 U.S. 1033 (1992) and in *Associated General Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992). Pet. 22. This higher threshold for standing, as dictated by these facts, was not satisfied. In its opposition, respondent did not make the slightest attempt to address this critical factual distinction which sets this case apart from *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. ____, 124 L.Ed.2d 586 (June 13, 1993) and the other authorities upon which respondent unreasonably relied.

The facts in *Northeastern* are clearly distinguishable from the facts herein. In *Northeastern*, a new ordinance was enacted which was also a set aside in that it allowed the city to reserve contracts for the **exclusive competition** of women and minority businesses ("WMBE"). *Id.* at 594. The use of set-asides for the exclusive competition of WMBEs under the facts of *Northeastern* makes it inapposite when compared to the facts of the instant case. The factual predicate at issue here involves neither set-asides nor preferences. While participation for those utilities subject to the Code and Order in the Commission's Women, Minority, Disabled Veteran Business Enterprise ("WMDVBE") program is mandatory, utilities' efforts to achieve the goals are voluntary. *California Public Utilities Commission*, D.95-12-045, slip op. at 7, (December 18, 1995).[2] Rep. App. 7-8,10. A

[2]On December 18, 1995, the Commission issued Decision No. 95-12-045 in Rulemaking 93-09-026 ("Rulemaking Decision") pertaining to the Commission's WMDVBE program. The text of that decision is set forth in the Appendix. Rep. App. 1-29. This Rulemaking Decision resolved various issues raised in R.93-09-026. In addition, in the Rulemaking Decision, the Commission amended § 8.12 of the Order to remove any penalty for failure of a utility to meet and/or exceed the WMDVBE goals. *California Public Utilities Commission*, D.95-12-045, slip op. at 11, (December 18, 1995), Rep. App. 11-12. This amendment merely conforms the Order to the underlying statute, the Commission's

goal is a "target which when achieved, indicates progress in a preferred direction. A goal is neither a requirement nor a quota." Order § 1.1.13, Pet. App. 75. While utilities are encouraged to maximize their use of WMDVBE businesses, utilities that fall short of attaining these goals must only provide a reasonable explanation of their failure to do so. *Id.*, slip op. at 11, Rep. App. 11. Petitioner has demonstrated that the Code and Order do not establish set-asides or preferences. Furthermore, nothing in the Code and Order prevents respondent from bidding on an equal footing with any other architect. Therefore, the authorities cited by respondent purporting to dispose of the issues in this case are inapplicable and cannot be forced to fit this factual predicate.

B. Constitutional Requirements for Article III Standing Remain Unchanged Notwithstanding the *Northeastern* Case.

Respondent falls short of meeting the "irreducible minimum of standing" required for going forward with this case. Pet. 11-12. Bras' utter failure to establish an actual or imminent injury defeats his claims. Since Bras seeks declaratory and injunctive relief against the Commission, a showing of past injury alone does not carry the day. This Court and the Ninth Circuit acknowledge that a showing of past injury does not establish a real and immediate threat of a similar injury in the future. Pet. 14-15. Instead, Bras is held to the standard of showing a "very significant possibility of future harm." *Coral Construction* at 929. Bras failed to show that the mere existence of the Code and Order will likely cause him imminent injury.

In an attempt to give legal legitimacy to its fatally flawed opposition, respondent suggests that *Northeastern* somehow

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intent and the actual operation of the WMDVBE program and in no way affects the otherwise mandatory provisions of the Code and Order.

alters the constitutional test for standing, thereby resolving "a previous split of authority between the Eleventh and Ninth Circuits." Opp. 16. This misguided notion is refuted by *Northeastern's* unambiguous statement that "[t]he doctrine of standing is 'an essential and *unchanging* part of the case-or-controversy requirement of Article III [emphasis added; citation omitted]." *Northeastern* at 595.

Respondent's rote recitation of abstract principles plucked from *Northeastern* does not make respondent's case. Respondent relies heavily upon the Ninth Circuit's holding that "[u]nder *Northeastern Fla.*, Bras need only demonstrate that he is 'able and ready' to bid on contracts and that a *discriminatory policy* prevents (him) from doing so on an equal basis." *Bras* at 873. Opp. 16-17; emphasis added. Were the facts in this case similar to the facts under *Northeastern*, the latter might have some applicability to this case. Such is not the case. The Commission's WMDVBE program does not authorize set-asides or preferences nor prevent anyone from competing for utility procurement on an equal basis. Moreover, the Ninth Circuit has acknowledged that it expressed "no opinion as to whether the Code or Order discriminates against Bras on the basis or race or gender." *Id.*, 875. Pet. App. 16. There is no proof of a discriminatory policy in this case.

II.

THE OPPOSITION AMOUNTS TO LITTLE MORE THAN UNSUBSTANTIATED CHARGES OF MISREPRESENTATION.

Respondent's allegations that petitioner has misstated the facts or has omitted material evidence are completely lacking in merit. Indeed, the vast majority of respondent's "Reasons That The Petition Should Be Denied" (Opp. 20-28) is devoted to such unfounded assertions, as opposed to a coherent discussion of the standing issue. Judged in the

most favorable light, such allegations reveal a profound lack of understanding of the Code and Order and the Commission's WMDVBE program. At worst, such allegations border on the bizarre.[3]

Indicative of respondent's serious lack of understanding of the Commission's WMDVBE program and utility procurement practice is respondent's quibble over the term "bid." Inexplicably, respondent claims that no bidding was involved in the selection process at issue in *Bras*. Opp. at 20. It is incontrovertible that Pacific Bell's preliminary screening is an integral part of its bidding process. Pacific Bell "invited" the 13 architectural firms to bid. The preliminary screening of architects is the *sine qua non* for determining which architects would be invited to negotiate further, and therefore falls under the umbrella of Pacific Bell's bidding process. Respondent's literal interpretation of the term "bid" is reflective of respondent's myopic view of the issues confronting the Court in this case.

In short, the Court should summarily dismiss respondent's unfounded assertions that petitioner either misstated the facts or failed to include material evidence. Such claims

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[3]Consider respondent's vague and unsupported accusation that the "Questions Presented" contains misstatements. Not only did respondent fail to state what the alleged misstatements were, respondent did not in any way attempt to reframe the question presented in accordance with respondent's unstated views. Petitioner has not misstated the facts, nor has petitioner misrepresented the Commission's WMDVBE program. The Code and Order submitted in the appendix to the certiorari petition speak for themselves and petitioner's references to the Code and Order all cite to the precise language set forth therein. Similarly, with regard to the omission of "material evidence," such allegations are also groundless. Petitioner properly refused to burden this Court with either cumulative and/or irrelevant evidence. Furthermore, respondent is free to augment the record to this Court if respondent so desires, and respondent has in fact done so.

are not only baseless, but result in respondent's utter failure to address the serious issues raised by the certiorari petition.

CONCLUSION

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 29, 1995

Decision 95-12-045 December 18, 1995

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's own motion to revise General Order 156.

R. 93-09-026
(Filed September 17, 1993)
(For appearances, See Attachment B.)

OPINION

On September 22, 1993, we issued an Order Instituting Rulemaking (OIR) in this docket to consider the amendment of General Order (GO) 156, which implements Public Utilities (PU) Code §§ 8281-8286. PU Code §§ 8281-8286, commonly referred to as the Women/Minority/Disabled Veterans Business Enterprise (WMDVBE) statute, requires certain described public utilities to seek to increase their procurement of goods and services from women, minority, and service disabled veteran-owned business enterprises. Among other things, GO 156 sets goals of purchasing 20% of the products and services used by utilities from WMDVBEs by the end of 1993 (15% for minority-owned business enterprises and 5% from women-owned business enterprises). Section 8.2.1 of GO 156, adopted by Decision (D.) 93-06-041, provides that numerical goals for Disabled Veteran Business Enterprises (DVBEs) will become effective in 1997. That section also provides that each utility establish an annual goal of increasing DVBE procurement (until 1997). It need not remain static until that time.

GO 156 has been amended several times since its 1988 adoption in D.88-04-057. Certain of these amendments were made pursuant to various petitions for modification of

D.88-04-057 in Rulemaking (R.) 87-02-026, while others were the product of three petitions for modification filed in R.91.-02-011, the most recent prior rulemaking proceeding.

On May 26, 1993, after widely disseminated notice, we convened a Full Panel Hearing (FPH) to inquire into the status of the WMDVBE program established under GO 156. Participants were invited to address a number of issues with implications for the existing GO 156 program. Subsequently, in D.93-07-057, we stated that a new proceeding would be opened to address the issues explored at the FPH. This is that proceeding.

Issues Raised for Consideration

As a result of experience gained by the Commission in the administration of the WMDVBE program from its inception, continuing dialogue with representatives of participating utilities, veterans' groups and other interested parties, and comments raised at the FPH, a number of issues were found to be in need of discussion and resolution in this proceeding. These issues were set forth in the OIR initiating this proceeding.

Interim Opinion (D.94-08-027) Issued August 3, 1994

In the period between September 22, 1993, the date the OIR in this proceeding was served, and August 3, 1994, Commission staff solicited comments from and met with representatives of a broad based group of utilities, women-owned and operated businesses, minority-owned business enterprises, disabled veterans and veterans organizations, governmental agencies, and others having an interest in this subject. In addition, the OIR requested the parties to this proceeding to provide comments on the issues referred to in the OIR with the understanding that those comments would be assessed by the Commission, and workshops, alternative dispute resolution processes or evidentiary hearings, as ap-

propriate, utilized to resolve contested issues before any revisions to GO 156 were proposed. Further, we indicated that any changes ultimately proposed would be mailed for comment to all on the service list established in this proceeding before we made a final decision.

During the course of the year-long discussions referred to above, several of the issues referred to in the OIR were resolved by agreement by and between the parties to the OIR. The issues which were resolved and the details of the manner of resolution were set forth in an Interim Opinion (D.94-08-027) signed on August 3, 1994, and served on the parties the following day. None of the issues resolved or the method of resolution set forth in the Interim Opinion required a change in or amendment to the text of GO 156.

Since D.94-08-027 did not resolve all of the issues referred to in the OIR, discussions concerning the unresolved issues continued, and the discussions were broadened to include some "housekeeping" matters that were not originally included in the OIR and which would not require any textual changes in GO 156.

In conformity with Ordering Paragraph 1 of the Interim Opinion (D.94-08-027), the Commission WMDVBE staff undertook a study to determine the comparability of the California Department of Transportation's (Caltrans) standards for verification of Women and Minority Business Enterprise (WMBE) status to the Commission's GO 156 program, and the feasibility of using the Caltrans' databank in the GO 156 program.

On November 18, 1994, a copy of the staff report referred to above was mailed to each of those who were on the service list of the OIR. Thereafter, pursuant to notice, a prehearing conference (PHC) was held before the assigned administrative law judge (ALJ) on November 21, 1994.

Copies of staff's report were distributed to all PHC attendees.

At the PHC, it was noted that all pending matters in R.87-02-026 had been settled and the latest petition for modification withdrawn, and that that proceeding was officially closed. Further, a discussion of the issues which remained unresolved after the issuance of the Interim Opinion, together with related issues, took place. At the conclusion of the PHC, the four yet unresolved issues were formally articulated by the ALJ, and the parties were requested to file additional comments on these four issues:

a. whether the current goal of 20% (15% minority plus 5% women) women and minority business enterprise utilization should be increased;

b. whether regularly scheduled generic proceedings are needed to provide a forum for resolving issues concerning utility goal achievement;

c. whether, or to what extent, reporting requirements should be established or changed by the Commission to account for utility utilization of (1) brokers or distributors, (2) WMDVBE utilities, and (3) subcontractors; and

d. whether the Commission should adopt the certification procedures contained in 49 CFR Part 23 and used by Caltrans for WMBE programs of state agencies, in place of the current verification standards utilized by Cordoba Corporation, the WMDVBE verification administrator for utilities.

Additional Issues

One of the matters which arose at the PHC and which has been the subject of much discussion, both informally and formally, is the most useful format for reporting the results of each utility's WMDVBE procurement efforts. While not alluded to in either the OIR or the Interim

Opinion, this is an issue of some substance, as a utility's report is currently the only source available to the Commission from which the extent of utility utilization of WMDVBE's may be ascertained. For this reason, we believe it is appropriate for us to consider this issue and propose a revised format to be used by the utilities in their yearly submission concerning their WMDVBE utilization. That discussion appears elsewhere in this decision.

In 1992, Liberty Builders, a verified WMBE, and Minority Business Enterprise Legal Defense and Educational Fund (MBELDEF), a public interest firm headquartered in Washington, D.C., filed a complaint against Pacific Gas and Electric (PG&E) (Case (C.) 92-07-016) alleging, among other things, that PG&E failed to exert its best efforts in encouraging and furthering minority participation in its procurement program. In response to the complaint, PG&E filed a motion to dismiss on the ground that a complaint proceeding is not the proper forum to challenge a utility's WMBE accomplishments. On the authority of case precedent, the motion was granted and the complaint dismissed (see D.94-10-048). In our decision dismissing the complaint, we indicated that while we agreed that the complaint procedure was not a proper vehicle for resolution of questions concerning utility outreach efforts, the substance of the complaint needed to be addressed. We then referred the allegations to this proceeding for consideration. The discussion of that matter is also to be found in a later portion of this decision.

Discussion

General

As indicated above, the Interim Opinion issued in this proceeding disposed of a number of issues referred to in the OIR, and specified a procedure for considering and disposing of the remaining unresolved issues.

It is to be noted that the OIR requested comments on the issues specified therein, and provided an opportunity for reply comments to be submitted. The parties to this proceeding responded to the offer to submit comments, and as a result, a large number of comments and reply comments addressing the various issues were received. Following receipt of comments and reply comments by the Commission, the parties, under the sponsorship of the Commission's WMDVBE Program Director and his staff, participated in a number of formal and informal meetings, workshops, and discussion groups, in which every aspect of the issues under consideration were explored. In view of the numerous opportunities afforded the parties for discussion of the issues under consideration and the thoroughness of the submissions of the parties, we believe additional hearings on the issues before us are unnecessary.

Proposed Decision and Comments

On September 12, 1995, the proposed decision (PD) of the ALJ was issued pursuant to § 311 of the PU Code disposing of the four outstanding issues and the "housekeeping" matter which was added during the pendency of this proceeding.

Following the issuance of the ALJ's PD, comments were received from virtually all of the utilities to which the WMDVBE statute applies, as well as from various organizations having an interest in this subject. In general, the majority of utility commenters opposed any increase in the numerical goals set forth in GO 156, while at the same time expressing a willingness to attempt to voluntarily increase minority/women participation in their utility's procurement program. As expected, representatives of various minority groups strongly urge increasing minority awards to the level of 30-50% of the utilities procurement contracts, with women obtaining up to 15%.

The commenters, in general, oppose the adoption of the verification standards set forth at Title 49 Code of Federal Regulations, Part 23, used by Caltrans for other state WMBE verification purposes. This opposition is based on the ever changing nature of those standards, and the fact that changes in those provisions are anticipated in the near future.

Few opinions were expressed on the issue of whether regular generic proceedings were needed to provide a forum for resolving issues concerning utility WMDVBE achievements.

The utilities were the main commenters on the issue of reporting requirements and the format of such reports. In general, the utilities favored maintaining the status quo.

Changes reflecting the adoption of some of the comments are made in the text where appropriate.

Issue No. 1:

Whether the current goal of 20% (15% minority plus 5% women) women and minority business enterprise utilization should be increased.

In the early days of the WMDVBE program, known then as simply the WMBE program, it was well appreciated that in the absence of enforcement provisions in the enabling statute, the ultimate success of the program depended on voluntary good faith compliance with the spirit of the WMDVBE statute codified at PU Code §§ 8281-8286. Further, each of the utilities subject to the statute expressed its commitment to increasing minority participation in its individual program for the procurement of goods and services. Everyone connected with the WMDVBE program was aware that a WMDVBE program within each utility covered by the statute was mandatory, i.e., § 8283 of the WMDVBE statute sets forth mandatory requirements that

direct the utilities subject to the statute to submit annual, detailed and verifiable plans for increasing WMDVBE procurement, to establish short- and long-term goals for WMDVBEs, and to comply with reporting requirements as established by the Commission. However, efforts to achieve the goals established were completely voluntary, and all recognized that success of the program would result only from the development of a spirit of cooperation and a genuine good faith effort to utilize and increase the level of minority participation.

As a result of much discussion and negotiation by and between the Commissioners, WMDVBE staff, and their counterparts in the utility sector, an initial goal of 20% minority participation (15% minority and 5% women) was established with the hope that that participation level could be achieved in the first five years of the program (by the year 1993). As is illustrated by the following breakdown, that goal for Women Business Enterprises (WBEs) was achieved by 1990, and for Minority Business Enterprises (MBEs) by 1994.

Contracts Awarded to WMBEs
(Expressed in % of total dollar value)

Year	WBE	MBE	Total
1990	7.73%	9.58%	17.31%
1991	9.48%	11.82%	21.30%
1992	8.10%	13.75%	21.85%
1993	6.63%	13.47%	21.99%[1]
1994	7.67%	15.11%	22.78%

Bearing in mind the success achieved in the program through 1994, and considering the fact that PU Code § 8281(b)(1)(B) indicates that public agencies [other than the Commission] which have established short- and long-

[1]Total includes 1.89% WMBE subcontractors and indirect purchases with gender/ethnicity unspecified.

range WMDVBE goals are awarding 30% or more of their contracts to such WMDVBE's, the Commission, through the assigned ALJ, requested at the November 21, 1994 PHC, that the parties file additional comments directed at whether the program's goal of 20% women and minority participation could be increased, possibly to 30%. Of those utilities which responded, only one indicated that it could achieve that level with no difficulty. Several indicated that they could not give a response without further study, and a few stated they could not reach a conclusion in the absence of a survey indicating the availability of minority and women vendors, as well as disabled veterans, sufficient to achieve such a level of participation. In a letter to the ALJ dated February 23, 1995, and submitted on behalf of the utilities, the spokesman for the utilities summarized the utilities' position on that issue in these words:

> "At the Prehearing Conference, Your Honor asked that the utilities comment once again on the issue of whether they would be willing to voluntarily increase their WMBE goals above those currently established by the individual utilities and beyond those required by Sections 8 and 8.2 of the Commission's General Order 156. The parties discussed this matter in detail on January 26, 1995, and concluded that this matter had been fully addressed in the utilities comments filed with the Commission, the Commission's Interim Opinion (D.94-08-027) and the response of each utility to Ordering Paragraph 2 of the Interim Opinion. Therefore, no further action on this matter is recommended.
>
> "The joint utilities remain firmly committed to achieve the maximum practical utilization of WMDVBEs and to strive to increase their annual WMDVBE procurement results. The joint utilities believe that goals are 'floors' and not 'ceilings' and will challenge themselves by voluntarily undertaking good faith efforts to increase

their WMDVBE procurement." (Letter from David L. Huard, Attorney, Southern California Gas Company to ALJ Robert L. Ramsey, February 23, 1995, pp. 1-2.)

We commend the joint utilities' expression of their firm commitment to achieve the maximum practical utilization of WMDVBEs and their commitment to increase their annual WMDVBE procurement results. However, the Commission clarifies that goals are neither floors nor ceilings. The Commission directs the parties to § 1.3.13 of GO 156 which defines goal in the following manner: " 'Goal' means a target which when achieved, indicates progress in a preferred direction. A goal is neither a requirement nor a quota." Thus, goals are targets that utilities voluntarily, and in "good faith," strive to meet. There are no repercussions if a utility falls below desired goals. At the same time, utilities are encouraged to meet or exceed what has been suggested as a target or goal.

On behalf of several minority groups, Public Advocates, a consortium of minority business enterprises, suggests that minority participation in utilities' WMDVBE procurement programs should be as high as 40%; 30% for MBEs and an additional 10% for WBEs. We believe those goals are laudable and achievable over time. In this regard, it is noteworthy that the utilities succeeded in achieving the initial goal of 20%, i.e., 5% for WBEs by 1990 and 15% for MBEs by 1994. The Commission is encouraged by these results. However, we must also note that only one utility indicated that it could achieve increased WMBE participation at this time. Several other utilities reserved reaching a conclusion until a survey or study of the availability of minority and women vendors is conducted. The Commission will review the matter within the context of the overall WMDVBE program.

As we stated in our R.93-09-026 (September 17, 1993), p. 7:

> "Before we could amend GO 156 to require utilities to set higher long term goals, we would need to establish on the record a rational basis for doing so. Obviously, detailed supplier availability studies such as those described in *Croson* and its progeny could form the basis for new goals. We do not reject the possibility that other bases for new goals could also be presented."

The record is insufficient at this time to support an increase in goals. However, as stated above, the Commission will entertain various bases for new goals with the understanding that the Commission must, under current law, have a clearly justified basis and adequate record for increasing those goals.

We applaud the WMDVBE results to date, recognizing that utilities' achievement of GO 156's WMDVBE goals are voluntary, and reflect the good faith intention of the utilities to increase the participation of women and minorities in their procurement programs. We encourage utilities to maximize their use of WMDVBE businesses, and we note that for those utilities that fall short of attaining GO 156's goals, that the utilities must only provide a reasonable explanation of their failure to do so.

The underlying statute, §§ 8281-8286 of the PU Code, does not provide for any penalty for failure of a utility to meet WMDVBE goals, nor does it provide for a penalty for a utility that exceeds its WMDVBE goals. Currently, § 8.12 of GO 156 reads as follows:

> "Except for any penalty imposed as a result of a Commission-initiated investigation, no penalty shall be imposed for failure of any utility to meet and/or exceed goals."

In the entire history of the WMDVBE program, the Commission has never initiated an investigation for the purpose of imposing a penalty for failure of any utility to meet and/or exceed goals. Furthermore, as stated above, the statute does not authorize such a penalty for the failure of any utility to meet and/or exceed goals. Therefore, in order to be consistent with both the underlying statute and Commission practice with regard to the WMDVBE program, the Commission is amending § 8.12 of GO 156 to read:

> "No penalty shall be imposed for failure of any utility to meet and/or exceed goals."

The Commission believes that this change to GO 156 is warranted as being consistent with the underlying statute, the Commission's intent and the actual operation of the WMDVBE program. This change to GO 156 in no way affects the otherwise mandatory provisions of §§ 8281-8286 of the PU Code or GO 156.

Disabled Veterans

In August 1990, Senate Bill 2398, was enacted by the Legislature and signed by the Governor, amending PU Code §§ 8281-8286 to include Disabled Veteran Business Enterprises (DVBEs) among the parties covered by those sections. That amendment to the PU Code was implemented by a subsequent amendment to GO 156 to include DVBEs, as provided in D.92-06-030. Thereafter, on June 3, 1993, in D.93-06-041, the Commission approved a settlement agreement among the utilities, the DVBE constituency and Commission WMDVBE program staff, which resolved then outstanding DVBE issues. That agreement provided that GO 156 be amended to add a new section [§ 8.2.1] to require each utility to establish a nonnumerical goal for increasing DVBE procurement through December 31, 1996,

followed by numerical goals set for 1997. Section 8.2.1 reads:

> "8.2.1 Each utility shall establish the annual goal of increasing DVBE procurement. In 1997, numerical goals will become effective."

Subsequent to the addition of § 8.2.1 to GO 156, the Commission convened a DVBE Goal Setting Task Force (GSTF), the purpose of which is to formulate a recommendation to the Commission regarding an appropriate numerical goal for utility procurement from DVBEs for 1997 and thereafter until changed.

The GSTF has initiated a fact gathering program and has undertaken to determine with a relative degree of precision, the number of disabled veterans who have been or are eligible to become verified DVBEs. The progress of the GSTF has been slowed appreciably by the lack of funding occasioned by budgetary pressures on both the state and upon the utilities. Like the state, utilities operate on budgets which have experienced severe contractions over the past several years, and as a result, programs such as the GSTF have not been able to accomplish their assigned tasks in the time the supporters of such programs anticipated or would like. The GSTF is, unfortunately, not immune from those difficulties.

In spite of these adverse economic pressures, the work of the GSTF continues, and we have no doubt that when its work has been completed, it will have arrived at a figure for DVBE participation acceptable to all parties. In the meantime, we note that while still small, DVBE participation in utility procurement programs is becoming statistically more significant and represents a growing percentage of the utilities' procurement effort. From 1992 through 1994, the DVBE participation rose five fold from 0.03% to 0.15% for the large utilities and about six fold from 0.06% to

0.34% for small utilities. We firmly believe and expect that DVBE participation levels in both large and small utilities' procurement programs will continue to grow at the same or an increasing rate, and for that reason we believe it appropriate to now establish an interim goal of 1.5%, which goal will be reviewed and subject to adjustment when the GSTF makes its final recommendation for the goals for 1997 and thereafter. We believe that the establishment of an interim goal at this time is necessary, given the unfortunate, yet understandable, delays experienced by the GSTF. The establishment of an interim goal, hopefully, will provide the utilities with a working target, while the GSTF prepares its recommendations for a numerical goal, to be effective January 1, 1997.

Issue No. 2:

Whether regularly scheduled generic proceedings are needed to provide a forum for resolving issues concerning utility WMDVBE achievements.

During our initial experience with the administration of the WMDVBE program, several problems concerning what procedural devices were available for the resolution of controversies under the WMDVBE statute and GO 156 arose. To illustrate, the issue in one early dispute was whether the complaint procedure set forth in the Commission's Rules of Practice and Procedure could be utilized to review a determination of the WMBE Clearinghouse denying verification of WMBE status to an applicant for such designation. Another example was whether the Commission's review of WMBE Clearinghouse determinations was to be *de novo* by the Commission or whether review should be restricted to a determination of whether the decision of the Clearinghouse was supported by substantial evidence in the record considered as a whole.

One issue that has been particularly troubling since the institution of the WMDVBE program is whether the complaint process is the proper, or best vehicle for a verified WMBE to challenge a utility's WMDVBE procurement efforts or achievements. We recognized that inherent in the question was the threat of vexatious litigation by a multiplicity of WMBEs sequentially seeking review of the same types of issues. Such a result was, in our view, undesirable, and in D.89-08-026, issued August 3, 1989, we held that a yearly generic proceeding was the proper forum in which to resolve issues concerning utility WMDVBE procurement results. Our thinking was that program accomplishments of the various utilities could best be reviewed and evaluated in an informal yearly proceeding by staff after the yearly achievement figures had been submitted by the utilities. Many WMBEs, however, interpreted our holding to mean that a formal trial-like procedure would be established in which the respective parties would appear before the assigned Commissioner or designated ALJ and present evidence supporting the parties' respective points of view, followed by the issuance of a formal decision by the Commission. This is not what we desired or intended. It was then and remains now our view that any allegation, in whatever form, challenging utility WMDVBE accomplishments be referred to the Commission's WMDVBE staff and examined and evaluated in light of that utility's achievements as reflected in its filed annual reports. Should the utility's WMDVBE efforts, after review by Commission staff, be found wanting, staff is in the best position to meet and confer with the utility in an effort to enhance the utility's effectiveness in achieving the program's stated goals.

Those having WMDVBE status must realize and remember that verification of WMDVBE status is not a guarantee

of the receipt of a contract award by any utility. As we said in D.91-01-012:

> "GO 156 does not require utilities to hire particular vendors. The legislation and implementing order are intended to help establish a level playing field, not to give special advantage to particular players." (Mimeo. at p. 11.)

That statement was a paraphrasing of an earlier statement we made in D.90-12-027, a decision regarding inclusion of natural gas purchases in the WMDVBE program:

> "We understand the concern that natural gas market uncertainty makes it impossible for utilities to be sure they can meet such a long-term goal, thus we remind the utilities that goals are just that — goals, and that if a utility cannot meet the goals it need only provide a reasonable explanation of its failure to do so. We emphasize that GO 156 does not create a set aside program for WMBEs, but rather simply opens the door for them to compete with established utility suppliers. If WMBEs cannot provide a needed product or service at a competitive price, they should not get the business.
>
> "We do not require the impossible, we merely wish to make clear that we consider this program important enough to take all steps necessary to ensure achievement of the possible." (38 CPUC2d 384, 394).

MBELDEF and Liberty Builders v. PG&E

On July 10, 1992, MBELDEF, a public interest firm, and Liberty Builders, a verified WMBE, filed a complaint (C.92-07-016) against PG&E, a public utility, alleging among other things, that PG&E did not put forth its best efforts in WMDVBE outreach in connection with its procurement program. PG&E moved to dismiss the complaint on the ground that under the authority of D.89-08-026, a

complaint proceeding was not the proper vehicle for resolution of the alleged malfeasance on the part of PG&E regarding its WMDVBE outreach program and efforts. In D.94-10-048, after disposing of a number of nonachievement issues on their merits, the Commission dismissed the remaining allegations of the complaint on the ground that a complaint was not the proper vehicle for resolution of issues involving utility WMDVBE achievements, and referred those issues to this "generic proceeding" for resolution.

In conformity to our original intent, MBELDEF's allegations concerning PG&E's WMDVBE outreach efforts have been considered and evaluated by Commission staff. An examination of PG&E's yearly WMDVBE reports discloses the following awards to WMDVBEs expressed as a percentage of the total procurement dollars spent by PG&E in each given year:

Reporting Year	Awards to WMDVBEs (Expressed as a % of total procurement dollars)
1990	15.9%
1991	22.8%
1992	23.1%
1993	21.3%
1994	24.4%

An examination of these figures reveals that while the Commission's stated industry-wide goal is 20% to be achieved by 1993, PG&E exceeded that goal as early as 1991, and has exceeded that goal each year since. From the foregoing, we find and conclude that MBELDEF's allegations that PG&E's WMDVBE outreach efforts were inadequate are without merit, and no action by this Commission based on MBELDEF and Liberty Builders' charges regarding goal achievement is warranted.

Issue No. 3:

Whether, or to what extent, reporting requirements should be established or changed by the Commission to account for utility utilization of (a) brokers or distributors, (b) WMDVBE utilities, and (c) subcontractors.

(a) **Brokers or Distributors:**

It often happens that in connection with its WMDVBE procurement program, a utility awards a contract to a verified WMDVBE that is a broker or a distributor. The question then arises whether the utility, utilizing Title 49 CFR Part 23 as a guide, should, when claiming amounts awarded to WMDVBEs, be required to report less than 100% of the dollars spent with a broker or a distributor. A simple example will illustrate the problem.

Assume a contract in the amount of $100,000 is awarded by a utility to a verified WMDVBE vendor that is a broker or distributor. Assume further that the items furnished by the vendor under the contract cost $75,000 wholesale and $25,000 represents the gross profit realized on the sale by the vendor. Heretofore, the Commission has allowed the utility to credit the entire $100,000 against its WMDVBE goal for that year. Under the rules set forth in 49 CFR, Part 23, however, the utility would be allowed to claim only the $25,000 gross profit realized by the vendor.

In the OIR, we requested comments on whether the Commission should adopt the federal reporting rule as expressed in 49 CFR, Part 23, or retain our present practice of allowing the entire contract amount as a credit against the utility's WMDVBE goal. The utilities were unanimous in their opposition to any change in the reporting rule, but not for the obvious and expected reason. While the utilities readily admitted that retaining the present rule made it far easier for the utilities to reach their individual WMDVBE yearly goals, they also pointed out the negative impact of

changing to the federal methodology. Adopting the federal reporting method would increase the utility's overhead costs, as it would require an independent auditing effort by the utility to verify the information supplied by each such vendor.

If the Commission were to adopt the federal methodology with respect to contracts awarded to brokers or distributors, each contract awarded, regardless of the type of product or service or the amount of the contract, would logically be required to be audited in the same manner, as each vendor has some costs associated with the procurement of the goods or services which are the subject of the contract awarded, and only a portion of the contract price will represent profit.

At the present time, we do not feel that a change in the method of accounting for the amount paid to brokers or distributors is justified, and will continue to allow the face value of contracts awarded to brokers and distributors to be credited against the utility's WMDVBE goal for that year. To do otherwise would, in our view, unnecessarily increase costs associated with the WMDVBE program, and thus jeopardize its continuation or the use of brokers or distributors that have played an important role.

(b) **WMDVBE Utilities:**

Situations involving WMDVBE utilities pose a similar problem as do brokers or distributors. The question here is whether utilities should be able to count toward their WMDVBE goals contracts with utilities which are themselves verified WMDVBEs. GO 156, § 8.9, excludes purchases from utilities from the category of products and services which must be included in the standard procurement base used to establish goals. Section 8.9 was designed to allow utilities permanently to exclude from their procurement base payments in areas such as franchise tax fees, and purchases from other utilities, which were believed to be

unlikely to ever be available from WMDVBEs. When GO 156 was adopted in 1988, it seemed unlikely that there would be many, if any, WMDVBE utilities, and it was believed that the large volume of utility purchases from other utilities, if included in the procurement base, would unrealistically skew the overall results and make it appear that utilities were making less progress than they actually were.

Now, however, with the ever expanding number of telecommunications utilities, such as cellular phone companies, there is at least one cellular carrier which is a verified WMDVBE. While it still appears appropriate to refrain from requiring utilities to include purchases from other utilities in their standard procurement base used to set goals, there is no reason to prevent utilities from counting actual purchases from verified WMDVBE utilities toward their WMDVBE goals.

(c) **Subcontractors:**

The issue of reporting subcontracts with WMDVBEs presents a different problem. The OIR raised the question whether GO 156 should be amended to allow utilities to report progress toward their yearly WMDVBE goals on a "percentage of purchase basis" in appropriate circumstances. GO 156 currently allows utilities to count only awards to verified WMDVBE subcontractors in their WMDVBE results (GO 156, § 6.3.9; see, *Re Public Utilities Code Sections 8281 to 8285 Relating to Women and Minority Business Enterprises* [D.88-09-024] 28 CPUC2d 36, 57). Only actual expenditures to WMDVBE subcontractors may be counted. *(Re Policies, Practices, Procedures, and Cost of Women and Minority Business Enterprise Programs Established Under General Order 156* [D.91-02-015], 39 CPUC2d 271, 274-275, 284 (Ordering Paragraph 1).)

Certain utilities proposed supplementing the requirement that utilities count only money spent with verified subcontractors in favor of a less stringent system which would allow them to estimate the usual percentage of WMDVBE subcontracts awarded by a prime contractor, and to apply that percentage, for goal meeting purposes, to each contract with that contractor. After Commission staff objected to this weakening of GO 156 during a March 13, 1995 workshop on the subject, the parties did agree that the present method of reporting subcontracting credits, counting only verified subcontractors, should not be changed. The parties indicated they would like the issue to remain open and not go to hearing, and they will continue to discuss it informally.

Issue No. 4:

Whether the Commission should adopt the certification procedures contained in 49 CFR, Part 23 and used by Caltrans for WMBE programs of state agencies, in place of the current verification standards utilized by Cordoba Corporation, the WMDVBE verification administrator for utilities.

On January 26, 1995, an informal conference was held among the utilities subject to the WMDVBE statute, the Commission's WMDVBE Program staff, and Systems Support Technologies (the staff's consultant), to discuss matters deriving from the November 21, 1994 PHC.

With respect to the question of the possible adoption of the verification standards set forth in 49 CFR, Part 23, which are used by Caltrans, in place of the current verification standards utilized by Cordoba Corporation (the Commission's verification administrator), the utilities observed that 49 CFR, Part 23 is still evolving, and one can only speculate on the final form it will take. The one thing that could be stated with certainty is that future change in the 49 CFR standards is inevitable. Consequently, the imple-

mentation of Assembly Bill 486, which largely rests on the interpretation of 49 CFR, is also currently in flux. Therefore, it was the consensus of those participating in the conference discussing this issue, that it would be most prudent to defer consideration of revising GO 156 to comport with federal standards, pending the establishment of a new uniform federal standard under the Federal Acquisition Regulations System, 48 CFR 1.000, *et seq.*

Thus, partly for reasons of cost, the utilities were of the view that the decision adopting the Caltrans standard should be postponed for at least a year. Staff has no opposition to the idea of postponing the resolution of this issue, and notes that the issue may be revisited at any time the Commission so desires.

In view of the above, we agree that the issue needs additional study before any decision to abandon the verification standard presently used by Cordoba Corporation can be made.

Utility WMDVBE Goal Achievement Reporting Format

Over the course of the administration of the WMDVBE program, Commission staff has continually sought to refine its data gathering methodology with the goal of standardizing utility reporting, and obtaining more precise data. As a result of this continuing effort, the format of the yearly utility report to the Commission has continued to evolve. To date, the utilities' WMDVBE procurement reporting has been presented in a nonstandardized, ad hoc fashion, tailored to the preferences of the individual utilities rather than to the need of the Commission for standardized data, in a consistent format. To remedy this shortcoming, a new reporting format has been developed, and a copy is annexed to this decision as Attachment A.

Findings of Fact

1. On May 26, 1993, an FPH was convened to inquire into the status of the WMDVBE program established under GO 156, which implements PU Code §§ 8281-8286, commonly referred to as the WMDVBE statute.

2. In D.93-07-057, which concluded the FPH proceeding, we stated that a new proceeding would be opened to address the issues raised at the FPH. This is that proceeding.

3. This proceeding was instituted by an OIR to consider amendment of GO 156.

4. In the OIR, a number of issues were delineated for exploration in this rulemaking proceeding.

5. Between September 22, 1993, the date the OIR was served, and August 3, 1994, Commission staff solicited comments from and met with representatives from a broad based group of utilities, women-owned and operated businesses, minority-owned business enterprises, disabled veterans and veterans organizations, governmental agencies and others having an interest in this subject.

6. In addition to meeting with representatives of various interested groups, Commission staff solicited comments on the issues referred to in the OIR with the understanding that those comments would be assessed by the Commission, and workshops, alternative dispute resolution processes or evidentiary hearings, as appropriate, utilized to resolve contested issues before any revisions to GO 156 are proposed.

7. During the course of the year-long discussions, several issues set forth in the OIR were resolved by agreement by and between the parties to the proceeding. Those issues and the resolution thereof were set forth in an Interim Opinion, D.94-08-027, issued August 3, 1994 and served the following day.

8. None of the issues resolved or the method of resolution set forth in the Interim Opinion required a change in or amendment of GO 156.

9. Discussion concerning the unresolved issues in this proceeding continued and the discussions were broadened to include "housekeeping" matters that would require no change in or amendment to GO 156.

10. In conformity with Ordering Paragraph 1 of D.94-08-027, Commission WMDVBE staff undertook a study to determine the comparability of the Caltrans standards for verification of WMBE status to the Commission's GO 156 program, and the feasibility of using the Caltrans databank in the GO 156 program.

11. A copy of the comparability study was served on each party to this proceeding and copies were distributed to those who attended the PHC held on November 21, 1994.

12. At the PHC, unresolved issues were discussed and at the conclusion of the PHC the ALJ articulated four unresolved issues remaining in the proceeding and requested the parties to file comments on those issues.

13. The unresolved issues on which the ALJ requested comments were:

a. whether the current goal of 20% (15% minority plus 5% women) WMBE utilization should be increased;

b. whether regularly scheduled generic proceedings are needed to provide a forum for resolving issues concerning utility WMBE goal achievement;

c. whether, or to what extent, reporting requirements should be established or changed by the Commission to account for utility utilization of (1) brokers or distributors, (2) WMDVBE utilities, and (3) subcontractors; and

d. whether the Commission should adopt the certifications procedures contained in 49 CFR, Part 23, and used by Caltrans for WMBE programs of state agencies, in place of the current verification standards utilized by Cordoba Corporation, the WMDVBE verification administrator for utilities.

14. The question of the most useful format for reporting utility yearly WMDVBE goal achievement was also raised.

15. A complaint filed by Liberty Builders, a verified WMBE, and MBELDEF, a public interest firm, was also considered by the staff during the course of this proceeding.

16. Since the PHC was held in November 1994, a number of meetings and workshops to discuss outstanding WMDVBE issues were held under the sponsorship of Commission WMDVBE staff.

17. Since 1990, the percentage of utility procurement contracts awarded to WMBEs, measured in terms of total dollar value, has steadily increased, and the 5% WBE participation goal has been met or exceeded each year since 1990, and the 15% MBE participation goal has been met since 1994.

18. Pursuant to D.93-07-057, § 8.2.1 of GO 156 was amended to require each utility to establish the annual goal of increasing DVBE procurement. That section also states that numerical goals will become effective in 1997.

19. The Commission WMDVBE staff has established a GSTF whose duty it is to determine and recommend a percentage goal for DVBE participation in utility procurement programs.

20. DVBE participation in utility procurement, while still less than 1% of total procurement, is increasing at a steady rate.

21. The GSTF is progressing in its study, however, its progress has been delayed by lack of funding due to unavailability of state and utility funding.

22. In D.89-08-026, we held that an annual generic proceeding was the proper forum for resolution of complaints challenging a utility's WMDVBE goal achievements.

23. We now find that the proper means for resolving complaints challenging a utility's WMDVBE goal achievements is informal review by Commission WMDVBE staff. This review comports with the voluntary nature of the utilities' efforts to achieve goals, and allows staff to meet and confer with the utility in an effort to enhance the utility's effectiveness.

24. With respect to the complaint filed by MBELDEF and Liberty Builders against PG&E alleging inadequate outreach efforts by PG&E, a review of PG&E's WMDVBE annual reports reveals that PG&E has exceeded established WMDVBE goals each year since 1991.

25. With respect to brokers or distributors, WMDVBE vendors, and subcontractors, the Commission allows the entire dollar value of the awarded contract to be credited against the contracting utility's yearly WMDVBE goal, whereas the 49 CFR, Part 23 standard allows the awardees *profit* to be so credited.

26. The Commission possesses insufficient information at this time to make a determination whether to adopt Caltrans WMBE verification standards in place of the current standards utilized by Cordoba Corporation.

27. A revised utility yearly WMDVBE goal achievement form is annexed to this decision as Attachment A.

Conclusions of Law

1. Utilities should strive to maximize, as much as is practicable, their WMDVBE procurement. Where goals are established, they should be viewed as targets for which there will be no penalty if a utility fails to meet them. At the same time, the attainment or transcending of the goals is encouraged.

2. DVBE numerical goals will become effective in 1997.

3. An interim goal of 1.5% DVBE participation is established subject to adjustment upon the presentation of the GSTF's report concerning DVBE goals for 1997 and thereafter.

4. Challenges to utilities' WMDVBE achievements should be referred to and reviewed by the Commission's WMDVBE staff and reviewed in light of the utilities' yearly WMDVBE participation reports without formal hearings.

5. Review of PG&E's filed WMDVBE reports indicate that PG&E exceeds the utility-wide WMDVBE goals; thus no further action in response to the MBELDEF and Liberty complaint is appropriate.

6. No change in the method of crediting contract dollar value paid by a utility to WMDVBEs who are distributors, WMDVBE utilities or subcontractors is desirable at this time. WMDVBE utilities may be included in WMDVBE procurement reporting and are not a subject of GO 156 § 8.9.

7. The utilities should not at this time adopt verification standards utilized by Caltrans in place of the Cordoba Corporation WMBE verification standards currently used by the utilities.

8. Attachment A will replace the various reporting styles currently used by the utilities.

ORDER

IT IS ORDERED that:

1. Section 8.12 of General Order (GO) 156 is modified to be consistent with Public Utilities (PU) Code §§ 8281-8286, with the Commission's intent, and with the actual operation of the program. The amended § 8.12 should read:

> "No penalty shall be imposed for failure of any utility to meet and/or exceed goals."

Other mandatory requirements of PU Code §§ 8281-8286 and GO 156 are not affected by this amendment.

2. We establish an interim goal of 1.5% for Disabled Veteran Business Enterprise (DVBE) participation, which is subject to adjustment, if necessary, after receipt of the Goal Setting Task Force's (GSTF) report. A numerical goal for DVBEs will become effective in 1997 after the GSTF has completed its study.

3. Challenges to utility Women/Minority/Disabled Veteran Business Enterprise (WMDVBE) outreach efforts or achievement levels shall be referred to and reviewed by the Commission's WMDVBE Program Manager, who shall examine and evaluate it in light of the WMDVBE participation levels set forth in the affected utility's yearly WMDVBE reports filed with the Commission.

4. The issue of Pacific Gas and Electric Company's goal accomplishments referenced by Decision 94-10-048 requires no further action.

5. Each utility subject to the WMDVBE statute shall report its yearly WMDVBE accomplishments on the form annexed hereto as Attachment A.

This order is effective today.

Dated December 18, 1995, at San Francisco, California.

DANIEL WM. FESSLER
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

(Attachments A and B are omitted).

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Supreme Court, U.S.
FILED
DEC 27 1995
CLERK

No. 95-767

In The

Supreme Court of the United States

October Term, 1995

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PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA, ET AL.,
Petitioner,

v.

J. JACK BRAS,
individually, and doing business as
J. JACK BRAS & ASSOCIATES,
Respondent.

♦

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S OBJECTION TO MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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7 pp

OBJECTION TO MOTION BY AT&T, PACIFIC GAS & ELECTRIC COMPANY AND SOUTHERN CALIFORNIA EDISON COMPANY FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent J. Jack Bras files the following objection to motion by AT&T, Pacific Gas, & Electric Company and Southern California Edison Company for permission to file an Amici Curiae brief in support of the Petition for Writ of Certiorari filed by the Public Utilities Commission of the State of California (hereinafter, the Commission).

The grounds for such objection are that the content of the arguments and facts presented in the Amici Curiae brief submitted to this Court in support of the Petition for Certiorari are not supported by the record and the brief materially misstates the "perception" of the various utilities as to the challenged General Order 156, in that it contradicts statements made by the very same utilities in their "comments" to the Commission in the Commission's own administrative proceeding regarding General Order 156 (Order Instituting Rulemaking, R. 93-09-026, appended to Respondent's brief, as A-23).

In particular, the basis of the Amici Curiae brief appears to be that there is no nexus for Article III standing of Respondent J. Jack Bras to challenge the WMBE statute and Commission General Order 156 because the Amici utilities now allege they perceived that the WMBE statute and General Order 156 are voluntary, rather than mandatory. However, in the Commission's own recent administrative proceeding "Order Instituting Rulemaking, R 9309-026, utilities including, but not

limited to AT&T, Pacific Gas & Electric and Pacific Bell filed comments stating that the perception of the utilities was that the program was NOT voluntary but was in fact MANDATORY:

The belief of the utilities, and we believe the Program Staff, was that the Commission program was mandatory. While the goals were not quotas, the utilities were required to set minimum procurement goals of 15% for minority-owned businesses and 5% for women-owned business (sic)(Section 8.2) and that there were potential repercussions to the utilities for failure to meet the goals established by the Commission. Joint Utilities Comments pps. 3, 4, attached hereto as Exhibit A and incorporated herein by reference.

. . .

fn 2 *See the extensive complaint procedures set forth in Section 7, the annual reports utilities are required to file with the Commission (Section 9) and the annual report the Commission is required to file with the legislature (Public Utility Code Section 8283). Also note D. 89-08-026 which clarifies that sanctions can be recommended in generic annual proceedings as well as in rate cases.* Joint Utilities Comments pps. 3, 4, fn 2. (Exhibit A)

. . .

...Section 6 of General Order 156 is entitled "Utility Implementation". The Preamble to Section 6 of General Order states "each utility's WMDVBE program shall be awarded to WMDVBEs." Such language can be interpreted as compelling utilities to award contracts to WMDVBE at a certain level. Joint Utilities Comments p. 4 (emphasis in original). (Exhibit A)

. . .

Attached for the Court's reference, are the "comments" by the Joint Utilities, including but not limited to AT&T, Pacific Gas & Electric Company and the "comments" of Southern California Edison Company to the proposed decision of ALJ Judge Ramsey in the Commission's own administrative proceeding OIR R. 93-09-026 as Exhibit A - Comments of Joint Utilities on Proposed Decision; Exhibit B - Comments of Southern California Edison Company (U338-E) on Proposed Decision; Exhibit C - AT&T Communication of California, Inc.'s (U5002c) Response to the California Public

No. 95-767

In The

Supreme Court of the United States

October Term, 1995

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,

Petitioner,

v.

J. JACK BRAS,

individually, and doing business as

J. JACK BRAS & ASSOCIATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

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CERTIFICATE OF SERVICE

In accordance with U.S. Supreme Court Rules 21 and 29, and 33.2, I hereby certify that I am a member of the Bar of this court, that I am Counsel of Record for petitioner, the Public Utilities Commission of the State of California ("Commission"), herein, and on December 27, 1995, I served the accompanying RESPONDENT'S OBJECTION TO MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI which was received by our office via facsimile on December 19, 1995, by

causing three copies to be sent via first class mail delivery to counsel for Petitioner and Amici Curiae in this proceeding at the addresses listed below:

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Executed at Walnut Creek, California, this 27th day of December 1995.

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By: _____
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MORGAN MILLER & BLAIR PROFESSIONAL CORPORATION

Utilities Commission's Order Instituting Rulemaking; Exhibit D - Comments of Southern California Edison Company (U338-E) in Response to Commission's Rulemaking and Exhibit E - the Proposed Decision of ALJ Ramsey in that proceeding; are attached hereto and incorporated herein by reference. As can be seen from a review of the utilities "comments" filed in the Commission's administrative proceedings, many of the statements by the utilities differ from the statements and arguments now made about the perception of the utilities as argued in the Amici Curiae brief, and therefore the motion to file an Amici Curiae brief should be summarily denied.

In addition, much of the factual content of the Amici Curiae brief does not contain references to the record on appeal but only recites verbatim portions of the District Court's unpublished statement of decision. There is no reason to allow an Amici brief which merely repeats matters argued by the parties and relies exclusively on the unpublished opinion of the District Court which was reversed by the Ninth Circuit Court of Appeals.

Accordingly, Respondent J. Jack Bras respectfully requests that this Court deny the motion by AT&T, Pacific Gas & Electric

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Company and Southern California Edison for permission to file the Amici Curiae brief, as submitted via mail December 14, 1995, and received via facsimile December 19, 1995 and via mail December 22, 1995.

Respectfully Submitted:

Dated: December 27, 1995

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